TRIAL EVIDENCE

THE RULES OF EVIDENCE

APPLICABLE ON THE TRIAL

OF

CIVIL ACTIONS

INCLUDING BOTH CAUSES OF ACTION AND DEFENSES

AT COMMON LAW, IN EQUITY

AND

UNDER THE CODES OF PROCEDURE

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CHAPTER XLVII

ACTIONS TO RECOVER POSSESSION OF SPECIFIC PERSONAL PROPERTY (REPLEVIN)

1. Existence and identity of the thing.
2. Plaintiff's ownership.
3. Defendant's taking and possession.
4. Fraud.
5. Demand.
6. Damages.
7. Declarations and admissions of former possessor.
8. *Defense.*

1. Existence and Identity of the Thing.

As the action is to recover a specific thing, plaintiff's evidence must sustain an inference that it existed as such,[75] at the time of commencing the action;[76] and show its identity

[75] Sager *v.* Blain, 44 N. Y. 445. A recovery as for money had and received cannot be maintained.

But replevin may be maintained to recover a belt containing a purse and money, if the belt is adequately described in the complaint. Eddings *v.* Boner, 1 Ind. T. 173, 38 S. W. Rep. 1110.

[76] Under the new procedure this is usually the time of service. N. Y. Code Civ. Proc., § 416; Wiggin *v.* Orser, 5 Duer, 118; Tracy *v.* N. Y. & Harlem R. R. Co., 9 Bosw. 396. In those jurisdictions where the issue of the writ is the commencement, the hour may be proved by extrinsic evidence (Knowlton *v.* Culver, 1 Chand. [Wis.] 214), and the date of the writ is not conclusive. Welles Replev. 425, § 792.

Replevin is a possessory action and can only be maintained by a person entitled to the possession of the property claimed at the time of the commencement of the action. Eldridge *v.* Sherman, 38 N. W. 255, 70 Mich. 266; see also Peterson *v.* Lodwick, 44 Nebr. 771, 62 N. W. Rep. 1100.

Replevin may be brought where the possession of the defendant is actual or constructive. Krebs Hop Co. *v.* Taylor, 52 Ore. 627, 97 Pac. Rep. 44, 98 Pac. Rep. 494. See also Alaske Unterstuetzung Verein *v.* Wall, 28 Misc. 174, 58 N. Y. Supp. 1115; West *v.* Graff, 23 Ind. App. 410, 55 N. E. Rep. 506.

In an action of replevin, where the evidence shows that the plaintiff recovered possession before the trial, a contention by the defendant that a verdict should be

sufficiently to enable the court to give judgment for what is to be delivered.[77] Declarations made by or in presence of a party and constituting a part of the *res gestæ* of his possession, are competent on the question of identity.[78]

2. Plaintiff's Ownership.

Plaintiff must prove that he[79] had a legal[80] or equi-

directed for him on the ground that he has been put into a position where he cannot respond to a judgment for possession, cannot be upheld, for the purpose of the action is to determine the right of possession at the time the action was started and further for the reason that the action must proceed for the purpose of determining who is entitled to costs, and also to determine whether or not the defendant is entitled to have the property returned to him. Kimmitt *v.* Deitrich, 22 S. D. 590, 119 N. W. Rep. 986.

[77] Graves *v.* Dudley, 20 N. Y. 76. The identification must be the more complete if it appears that defendant has several of the same kind. Id. To support replevin it is not necessary that the property should retain its original form so long as it can be identified. Clemmons *v.* Brinn, 36 Misc. 157, 72 N. Y. Supp. 1066. For the mode of proof in other respects see chapter XXXVI, paragraphs 8 and 9 of this vol. Undertaking and affidavit in claim and delivery, held not evidence of identity. Talcott *v.* Belding, 36 Super. Ct. (4 J. & S.) 84.

A judgment in replevin does not necessarily determine the title to property. Pearl *v.* Garlock, 61 Mich. 419, 28 N. W. Rep. 155, 1 Am. St. Rep. 603.

Lumber may be the subject of replevin, though it cannot be identified, because of its intermixture with other lumber of the same kind and value. Mine La Motte Lead, etc., Co. *v.* White, 106 Mo. App. 222, 80 S. W. Rep. 356.

Replevin will not lie to recover property in the possession of the defendant and brought by him with money unlawfully taken from the plaintiff. Vogt Manufacturing, etc., Co. *v.* Oettlinger, 88 Hun, 83, 34 N. Y. Supp. 729.

Replevin merely determines the right of possession at the time of the commencement of the action. Liver *v.* Mills, 155 Cal. 459, 101 Pac. Rep. 299.

A judgment is irregular which gives possession of the property in controversy to the plaintiff and also awards damages for its value. Greenberg *v.* Stevens, 114 Ill. App. 483, aff'd in 212 Ill. 606, 72 N. E. Rep. 722.

[78] Crowther *v.* Gibson, 19 Mo. 365; Yarbrough *v.* Arnold, 20 Ark. 592, 597.

[79] Rogers *v.* Arnold, 12 Wend. 30.

[80] M'Curdy *v.* Brown, 1 Duer, 101; Dodworth *v.* Jones, 4 Duer, 201; Rockwell *v.* Saunders, 19 Barb. 473.

table [81] right to immediate possession [82] at the commencement of the action,[83] and this is enough. Right to the possession

The plaintiff has the burden of proving his ownership of the property in controversy, his right to immediate possession thereof, and its wrongful detention by the defendant. Peterson *v.* Lodwick, 44 Nebr. 771, 62 N. W. Rep. 1100. See also Brunson *v.* Volunteer Carriage Co., 93 Miss. 793, 47 So. Rep. 377; McLeroth & Co. *v.* Magerstadt, 136 Ill. App. 361.

In replevin where both parties claimed mill machinery under a sale from the same person, the declarations of one of the parties concerning the sale and the amount paid by him at the time of the transfer was considered competent evidence as a part of the *res gestæ*. Fox *v.* Cox, 50 N. E. Rep. 92, 20 Ind. App. 61.

Evidence that no taxes were assessed against a person claiming the property was properly admitted. Similarly the fact that a wife joined with her husband in a mortgage is evidence that she did not have complete title to the mortgaged property. Kastl *v.* Arthur, 135 Mich. 278, 97 N. W. Rep. 711.

[81] Frost *v.* Mott, 34 N. Y. 253.

The mere equitable right to the possession of property will not enable the plaintiff to maintain replevin. National Bank of Deposit *v.* Rogers, 1 N. Y. App. Div. 623, 37 N. Y. Supp. 365, citing Deeley *v.* Dwight, 132 N. Y. 59, 30 N. E. Rep. 258, 18 L. R. A. 298.

[82] A right by virtue of a lien is enough. Baker *v.* Hoag, 7 N. Y. 555 (overruling 3 Barb. 203); Baker *v.* Hoag, 7 Barb. 113; Fitzhugh *v.* Wiman, 9 N. Y. 559. For the mode of proof in an action by an officer, see chapter VIII, paragraph 10 and chapter XXXIII, paragraph 2.

See Fagan Iron Works *v.* Dawson Realty Co., 109 N. Y. Supp. 740.

The plaintiff in replevin must succeed on the strength of his own right to possession. North Shore Boom, etc., Co. *v.* Nicomen Boom Co., 52 Wash. 564, 101 Pac. Rep. 48. Citing Harvey *v.* Ivory, 35 Wash. 397, 77 Pac. Rep. 725. "But his right to possession is not thus absolute; it is conditional only, dependent on his ability to make good his title and right of possession, when these rights are called in question by the defendant. If he fails to make good his title or right of possession, the right of the defendant to have the property returned to him, or to have its value in case it cannot be returned, follows as a matter of course." Black *v.* Roberson, 87 Ark. 641, 112 S. W. Rep. 402; Morgan *v.* Jackson, 32 Ind. A. 169, 69 N. E. Rep. 410.

[83] See note 2 to paragraph 1.

"The remedy of claim and delivery, as prescribed by our statute (B. & C. Comp., § 284, *et seq.*)

and dominion of the goods for the time is all that is essential.[84] Ownership may be proved under a general allegation, designating the things as the "goods of the plaintiff." [85]

If title is expressly alleged and put in issue, the burden is on plaintiff to prove title, even though defendant has affirmatively alleged an adverse title as his defense.[86] The quiet

is substantially the same as replevin, which is a mixed action, partly *in rem* and partly *in personam*, and can be brought only against the person having possession or control of the goods at the time the suit is begun." Krebs Hop Co. *v.* Taylor, 52 Ore. 627, 97 Pac. Rep. 44, 98 Pac. Rep. 494. See also Segars *v.* Segars, 82 S. C. 196, 63 S. E. Rep. 891.

[84] Johnson *v.* Carnley, 10 N. Y. 570; Cameron *v.* Wentworth, 23 Mont. 70, 57 Pac. Rep. 648.

Property taken by a sheriff when not exempt from execution under a writ regular upon its face, issued by a court of competent jurisdiction, cannot be replevied from such officer by the defendant or any one claiming title under him. Kelso *v.* Youngren, 86 Minn. 177, 90 N. W. Rep. 316. See also subdivision 2, § 1690, N. Y. Code Civ. Proc., and Pracht *v.* Gunn, 69 N. Y. App. Div. 396, 74 N. Y. Supp. 991.

[85] Simmons *v.* Lyons, 55 N. Y. 671, affi'g 35 N. Y. Super. Ct. (3 J. & S.) 554. Under an allegation of absolute ownership, proof of a lien only is a variance, but usually amendable. Rucker *v.* Donovan, 13 Kans. 251, s. c., 19 Am. Rep. 84.

An allegation that the goods "belonged to" the plaintiff is sufficient averment of ownership Littlefield *v.* Maine Central R. Co., 104 Me. 126, 71 Atl. Rep. 657.

But where a petition simply alleges that the plaintiff was "lawfully entitled to the possession, of," etc., an action cannot be maintained. Donnell *v.* Miller, 133 Mo. App. 693, 113 S. W. Rep. 1132.

Where the complaint alleges that the plaintiffs are the owners and are entitled to possession of the property and the subsequent statement of facts showing how they became such owners does not detract from the allegation, it was held suffiicent to constitute a good cause of action in replevin. Donovan *v.* Stuber, 130 N. Y. App. Div. 235, 114 N. Y. Supp. 593.

[86] Reynolds *v.* McCormick, 62 Ill. 412; Morgner *v.* Biggs, 46 Mo. 65; Chandler *v.* Lincoln, 52 Ill. 74.

Where the vendor accepted an offer for the purchase of personal property and stated that he would be ready to give the purchaser the property on a specific day in the future upon payment of the purchase money, it was held that this was an executory agreement and did not pass title immediately to the vendee who consequently was barred from maintaining replevin against a second purchaser to whom the property had been sold

and peaceable possession by plaintiff of the property, at the time of seizure, is *prima facie* evidence of his title, and throws the burden on defendant of proving the contrary;[87] but possession is not sufficient evidence of title as against direct evidence of title in defendant or even evidence of prior possession in him under claim of title.[88]

If plaintiff proves ownership and right to immediate possession, he need not prove that he ever had possession.[89]

Subject to the qualification that plaintiff must prove immediate right of possession of a thing in existence at the commencement of the action, his right is proved as in case of conversion.[90]

Evidence cannot be received for the purpose of litigating the title of land under the form of an action for replevin;[91]

by the vendor for value and without notice of the first sale. Kerr *v.* Henderson, 62 N. J. L. 724, 42 Atl. Rep. 1073.

[87] Schulenberg *v.* Harriman, 21 Wall. 44, 59; Robertson *v.* Brown, 1 N. Y. Leg. Obs. 297.

Possession of personal property is *prima facie* evidence of ownership. Black *v.* Roberson, 87 Ark. 641, 112 S. W. Rep. 402.

[88] Wells Replev. 67–69, §§ 109–116.

"Proof of actual possession of land will make a *prima facie* case of title and right as against any but the true owner or one connecting his title with him. Upon such evidence a *prima facie* case of right to the dominion and possession of timber severed from the land by a mere wrongdoer would support an action of replevin." Webb *v.* Phillips, 80 Fed. Rep. 954, 26 C. C. A. 272.

[89] Clark *v.* Skinner, 20 Johns. 465; Dunham *v.* Wyckoff, 3 Wend. 280; Neff *v.* Thompson, 8 Barb. 213; Garcia *v.* Gunn, 119 Cal. 315, 51 Pac. Rep. 684. See also Beggs *v.* Smith, 26 Cal. App. 532, 147 Pac. Rep. 585.

[90] Chapter XXXV, paragraphs 3, etc., of this vol.

Any proof that will make out a conversion will sustain an action in replevin. Milligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 N. Y. Supp. 744.

Where the complaint alleges that the defendants wrongfully took and unlawfully detained the chattel, it was held that such an averment is equivalent to an assertion that when the action was commenced the property in question was in the possession of the defendants. Krebs Hop Co. *v.* Taylor, 52 Ore. 627, 97 Pac. Rep. 44, 98 Pac. Rep. 494.

[91] Wells Replev. 50–54, §§ 79–89.

An action of replevin may be brought for the recovery of title deeds wrongfully detained but not

but, for the purpose of determining the ownership of products of the land, plaintiff may prove a title [92] or right of possession [93] in the land, such as to give that ownership, if defendant was a trespasser, or had not paramount title or a ripe adverse possession.[94] It is no objection that title to the land is not alleged in the pleading.[95]

3. Defendant's Taking and Possession.

Evidence of actual, forcible dispossession of plaintiff is not necessary; any unlawful interference with another's property or exercise of dominion over it, by which the owner is damnified, is sufficient.[96] If defendant is shown to have

if the controversy involves the determination of title to the land conveyed by such deeds. Pasterfield *v.* Sawyer, 132 N. C. 258, 43 S. E. Rep. 799; Christenson *v.* Hanna, 183 Ill. App. 115.

[92] Hart *v.* Vinsant, 6 Heisk. (Tenn.) 616; Loucks *v.* Winne, 127 N. Y. App. Div. 460, 111 N. Y. Supp. 485.

[93] Halleck *v.* Mixer, 16 Cal. 574, for the mode.

Evidence that the plaintiff executed a land contract, that the assignee thereof made a part payment thereon but did not have possession, that the arrangement was that the assignee would cut timber on the land and deliver the same to the plaintiff who would saw it and apply the proceeds upon the purchase price, and that pursuant thereto the timber was delivered to the plaintiff, is sufficient to warrant a finding that the delivery would vest in the plaintiff possession and a special property good enough to enable him to maintain replevin against a stranger. Rohrer *v.* Lockery, 136 Wis. 532, 117 N. W. Rep. 1060.

[94] For the mode of proof, see chapter XXXVII, paragraph 1 of this vol., and Chap. XLVIII.

[95] Grewell *v.* Walden, 23 Cal. 165, 169.

[96] Allen *v.* Crary, 10 Wend. 349; Fonda *v.* Van Horne, 15 Id. 631; Hymann *v.* Cook, 1 How. App. Cas. 419; Knapp *v.* Smith, 27 N. Y. 277; Latimer *v.* Wheeler (below). Compare Bent *v.* Bent, 44 Vt. 633. For the mode of proof in an action against an officer, see chapter VIII, paragraphs 12–19, chapter XXXIII and chapter XXXVI, paragraph 7, of this vol.

The affidavit upon which the replevin writ is issued need not contain a statement that the property was wrongfully taken. Ryan *v.* Schutt, 135 Ill. App. 554.

An action in replevin by the owner of personal property will lie against a person who has such personal property in his possession and who has no right to retain it as against the owner. Opperman

had possession, and either wrongfully parted with it,[97] or was privy to a demand and refusal,[98] his lack of possession at the commencement of the action is not material.

A conversion need not be proved merely because alleged.[99]

An undertaking or bond on which defendant obtained the return of the property under the statute is competent in disproof of his denial that he had detained it.[1]

4. Fraud.

A fraud by which defendant obtained the goods from plaintiff may be proved though not alleged.[2]

5. Demand.

Demand may be proved though not alleged.[3] Proof of a

v. Citizen's Bank, 44 Ind. A. 401, 85 N. E. Rep. 991.

[97] Nichols *v.* Michael, 23 N. Y. 264; Dunham *v.* Troy Union R. R. Co., 1 Abb. Ct. App. Dec. 565.

[98] Latimer *v.* Wheeler, 3 Abb. Ct. App. Dec. 35, affi'g 30 Barb. 485.

[99] Vogel *v.* Badcock, 1 Abb. Pr. 176. For the mode of proof, see chapter XXXV, paragraph 10 of this vol.

[1] Black *v.* Foster, 7 Abb. Pr. 406, s. c., 28 Barb. 387; but does not admit cause of action. Church *v.* Frost, 3 Supm. Ct. (T. & C.) 318.

[2] Hunter *v.* Hudson River Iron & Machine Co., 20 Barb. 493; Bliss *v.* Cottle, 32 Id. 322. For the mode of proving fraud or deceit, see chapter XXXV, paragraph 10 of this vol., and the chapters on actions for deceit or fraud, and on fraud as a defense.

One from whom goods have been fraudulently obtained may replevy the manufactured articles into which his goods have been converted, though in the manufacturing goods of the wrongdoer were also used. Levy *v.* Barnett, 60 N. Y. Supp. 991.

Where the evidence showed that the plaintiff in replevin informed the defendant that if the chattel was his property he could come and get it and the defendant's servant went to the plaintiff's wife and said her husband sent him for the chattel and received it, it was held that as the chattel was taken in the plaintiff's absence without his authority there was no surrender in law such as to prevent him from maintaining an action of replevin. Taylor *v.* Mills, 148 N. C. 415, 62 S. E. Rep. 556.

[3] Wells Replev. 370, § 681, and see chapter XXXV, paragraph 11 of this vol.

But see Burke *v.* Maguire, 154 Cal. 456, 98 Pac. 21, which holds

wrongful taking by defendant dispenses with the necessity of evidence of demand to sustain the action against him.[4]

6. Damages.

Damages which are the natural result of the circumstances of the taking may be proved in connection with those cir-

that "one lawfully in possession of property which he does not claim and which he has not converted to his own use, but is holding for the rightful owner with the intent to deliver it to him on demand, is entitled to an opportunity to comply with his duty before being subjected to a suit to recover it; that is, to a demand for its delivery. Such demand in such a case is a condition precedent to the right to maintain an action to follow the specific property, or recover it, and it must be alleged and proven." 13 Cyc. 806, 1 Cyc. 408, 694.

In some cases the action may fail for lack of demand. Pearl *v.* Garlock, 61 Mich. 419, 28 N. W. Rep. 155, 1 Am. St. Rep. 603.

The demand to support replevin of a chattel held by the defendant under a contract of conditional sale is not sufficient when made on third persons not having custody or control of the property. Henrich *v.* Van Wrickler, 80 N. Y. App. Div. 250, 80 N. Y. Supp. 226.

Demand is a matter of proof not of pleading. Littlefield *v.* Maine Central R. Co., 104 Me. 126, 71 Atl. Rep. 657.

Where after the commencement of the suit a controversy arose as to a demand and the defendant said: "I waive all demand; you can go ahead with your replevin," he will be deemed to have waived the necessity of a demand and estopped from denying that a demand was made. Hamiliton *v.* Seeger, 75 Ill. App. 599 (citing Gaff *v.* Harding, 66 Ill. 61).

[4] Wells Replev. 199, § 348. But not for the purposes of damages. Id.

"Where one's property has been disposed of by the one having it in charge, without authority, the owner may bring replevin for it without a previous demand. Coffey on Replevin, Sec. 512, citing Trudo *v.* Anderson, 10 Mich. 357," 81 Am. Dec. 795; Taylor *v.* Welsh, 138 Ill. App. 190. See also Mulligan *v.* Brooklyn Warehouse, etc., Co., 34 Misc. 55, 68 N. Y. Supp. 744.

An assignee of a bankrupt to whom property has been conveyed in good faith for the benefit of creditors can maintain a replevin suit against a constable for property taken under an execution against the bankrupt because the assignee has the legal title to the property, and in such a case he may maintain replevin without making a demand. Pogue *v.* Rowe, 236 Ill. 157, 86 N. E. Rep. 207. See also Ryan *v.* Schutt, 135 Ill. App. 554 and Dougherty *v.* Neville, 108 N. Y. App. Div. 89, 95 N. Y.

cumstances, although those circumstances are not alleged;[5] and so may depreciation in value, from naturally expected causes, during detention;[6] but special damages must be

Supp. 806, affi'd in 186 N. Y. 578, 79 N. E. Rep. 1103.

[5] Wells Replev. 311, § 571.

Exemplary damages may be recovered only where there have been particular circumstances of fraud, oppression or wrong in the taking or the detention of the property. Armstrong *v.* Philadelphia, 249 Pa. 39, 94 Atl. Rep. 455, Ann. Cas. 1917, B. 1083.

"Although plaintiff might not be able to recover possession of the property he nevertheless would have the right to such damages as he sustained by reason of the unlawful seizure on the part of the defendants." Segars *v.* Segars, 82 S. C. 196, 63 S. E. Rep. 891.

The plaintiff may recover as damages the difference between the value of the property when the defendant got possession of it and its value when taken on the writ. The expense incurred by the plaintiff in trying to find what disposition was made of the property is not an element of damage. Taylor *v.* Welsh, 138 Ill. App. 190.

In Cooper *v.* Ratliff (Ky.), 116 S. W. Rep. 748. Where damages were sought to be recovered for the detention of lumber, it was held that the measure of damages was the difference between its fair market value at the place and time of the taking and the fair market value at the time the defendant refused to deliver it to the plaintiff upon demand.

[6] Id., Young *v.* Willet, 8 Bosw. 486.

If there had been a depreciation in value while the chattel remained in the possession or under the control of the unsuccessful party, damages may be recovered for such injury or depreciation. N. Y. Code Civ. Proc., § 1722.

"Where there is a judgment of return against the plaintiff in replevin, and he fails to return some of the goods, and those which are returned are injured, the measure of damages in a suit on his undertaking is the value of the goods not returned, with legal interest from the time of the replevin and deterioration in value of those returned resulting from such injury, with legal interest thereon from the date of their return." Franks *v.* Matson, 211 Ill. 338, 71 N. E. Rep. 1011.

As a general rule the value of property in replevin must be assessed as at the time of trial. Where therefore corn which is the subject of the action has been consumed, it is proper to admit evidence of the value of corn of the same grade at the time of trial. Schnabel *v.* Thomas, 98 Mo. App. 197, 71 S. W. Rep. 1076.

The jury having been directed to find the value of certain articles as at the time of trial, it will be presumed that they followed such direction, though the verdict does not expressly so state. Tripp *v.*

specially alleged. Appraisement under the statute is not conclusive evidence of value.[7]

7. Declarations and Admissions of Former Possessor.

The rules as to the acts and declarations of one under whom a party claims have been already stated.[8] Declarations claiming [9] or disavowing ownership [10] are not conclusive against the declarant, unless other facts raising an estoppel are shown.

8. Defenses.

Defendant may recover on plaintiff's failure to prove title and right of possession.[11] A denial of plaintiff's allegation

Smith, 50 A. D. 499, 64 N. Y. Supp. 94, aff'd 168 N. Y. 655, 61 N. E. Rep. 1135.

[7] Wells Replev. 311, § 570. For the mode of proving value and damages, see chapter XVI, paragraphs 20–23, 85; chapter XXXI, paragraph 40 and chapter XXXV, paragraph 12, of this vol. As to value of use see Yandle *v.* Kingsbury, 17 Kans. 195, s. c., 22 Am. Rep. 282; Allen *v.* Fox, 51 N. Y. 562, overruling 4 Lans. 263.

"In an action of replevin the verdict must fix the damages, if any, of the prevailing party; and, where it awards to the prevailing party a chattel which has been replevied and afterward delivered by the sheriff to the unsuccessful party, the verdict must also (except in cases not material to this question) fix the value of the chattel at the time of the trial. Code Civ. Pro., Sec. 1726." Pabst Brewing Co. *v.* Rapid Safety Filter Co., 56 Misc. 445, 107 N. Y. Supp. 163.

[8] Chapter I, paragraph 27 and chapter V, paragraph 122 of this vol.; Whittaker *v.* Brown, 8 Wend. 490; Bristol *v.* Dann, 12 Id. 142; Worrall *v.* Parmelee, 1 N. Y. 519; Taylor *v.* Marshal, 14 Johns. 204; De Wolf *v.* Williams, 69 N. Y. 621. Under the New York rule, continued possession of a chattel is not alone such an act as renders the possessor's declarations competent under the rule of *res gestæ*. Tilson *v.* Terwilliger, 56 N. Y. 273.

[9] Heaton *v.* Findlay, 12 Penn. St. 304.

The unsworn declarations of the plaintiff as to ownership made out of court are inadmissible. Root *v.* Borst, 142 N. Y. 62, 36 N. E. Rep. 814.

[10] Hunt *v.* Moultrie, 1 Bosw. 531.

[11] McCurdy *v.* Brown, 1 Duer, 101.

"The law seems to be well settled that the plaintiff in a replevin action must recover on the strength of his own title or right of possession, and not on the weakness of

of property and right of possession admits evidence of title and right of possession, either in defendant or any other person; [12] and defendant may show such property in a third person without connecting himself with it.[13] The mode of proving justification under process has been already stated.

his adversary's, and the defendant may defeat the action by showing title even in a third person." Robb *v.* Dobrinski, 14 Okl. 563, 78 Pac. Rep. 101, 1 Ann. Cas. 981.

[12] Schulenberg *v.* Harriman, 21 Wall. 44, 59; Sparks *v.* Heritage, 45 Ind. 66; Timp *v.* Dockham, 32 Wis. 146; Caldwell *v.* Bruggerman, 4 Minn. 270, 276. And see Morey *v.* Safe Deposit Co., 7 Abb. Pr. N. S. 199, s. c., 39 How. Pr. 124. Compare Ontario Bank *v.* N. J. Steamboat Co., 59 N. Y. 510, affi'g 5 Daly, 117.

Oakland Mfg. Co. *v.* F. C. Linde Co., 162 N. Y. App. Div. 543, 147 N. Y. Supp. 1045; Levy *v.* Kelter, 63 N. Y. App. Div. 392, 71 N. Y. Supp. 509; Stearns *v.* Early, 49 Misc. 614, 96 N. Y. Supp. 837.

Where the plaintiff's allegation of right to the property in question is formally traversed, the necessity of proving his title thereto in order to sustain the action of replevin is upon the plaintiff. McLeroth & Co. *v.* Magerstadt, 136 Ill. App. 361.

[13] Rockwell *v.* Saunders, 10 Barb. 473, and cases cited.

But it is no defense that the property was not in the possession of the defendant when the action was commenced. Segars *v.* Segars, 82 S. C. 196, 63 S. E. Rep. 891.

CHAPTER XLVIII

ACTIONS TO AFFECT THE TITLE OR POSSESSION OF REAL PROPERTY

I. ACTIONS TO RECOVER THE POSSESSION OF REAL PROPERTY. (EJECTMENT.)

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I. ACTIONS TO RECOVER THE POSSESSION OF REAL PROPERTY. (EJECTMENT)

1. Plaintiff's Title.

Plaintiff can only recover on the strength of his own title.[14]

[14] Graham *v.* Lunsford, 149 Ind. 83, 48 N. E. Rep. 627; Helm *v.* Johnson, 40 Wash. 420, 82 Pac. Rep. 402; Caudle *v.* Long, 132 N. C. 675, 44 S. E. Rep. 368; Henderson *v.* Wanamaker, 49 U. S. App. 174, 79 Fed. Rep. 736; Union Pac. Ry. Co. *v.* Reed, 49 U. S. App. 233, 80 Fed. Rep. 234; West *v.* East Coast Cedar Co., 110 Fed. Rep. 725. The plaintiff must show a regular chain of title back to some grantor in possession or to the government. Florence Bldg. Assoc. *v.* Schall, 107 Ala. 531, 18 So. Rep. 108; Warren *v.* Williford, 148 N. C. 474, 62 S. E. Rep. 697; Ronk *v.* Higginbotham, 54 W. Va. 137, 46 S. E. Rep. 128; Mitchell *v.* Garrett, 53 S. E. Rep. 226, 140 N. C. 397; Greenleaf *v.* Brooklyn &c. R. R. Co., 132 N. Y. 408, 28 Abb. N. C. 161; later decision 141 N. Y. 395. But where both parties claim title from a common source, plaintiff need not prove title back of such source. Id., Florence Bldg. Assoc. *v.* Schall, 107 Ala. 531, 18 So. Rep. 108. "We concur in what the Supreme Court of Appeals of Virginia said in a case recently decided: 'In an action of ejectment the plaintiff must recover on the strength of his own title, and if it appears that the legal title is in another, whether that other be the defendant, the commonwealth, or some third person, it is sufficient to defeat the plaintiff. If it appears that the title has been forfeited to the commonwealth for non-payment of taxes, or other cause, and there is no evidence that it has been redeemed by the owner, or resold, or regranted by the commonwealth, the presumption is that the title is still outstanding in the commonwealth.' Reusens *v.* Lawson, 91 Va. 226, 21 S. E. Rep. 347." King *v.* Mullins, 171 U. S. 404, 436–437.

In Mobley *v.* Griffin, 104 N. C. 112, 10 S. E. Rep. 142, the different methods by which the plaintiff may show a *prima facie* title are stated by the court as follows:

"1. He may offer a connected chain of title, or a grant direct from the state to himself.

"2. Without exhibiting any grant from the state, he may show open, notorious, continuous adverse and unequivocal possession of the land in controversy, under color of title in himself and those under whom he claims, for twenty-one years before the action was brought—(citing cases).

"3. He may show title out of the state by offering a grant to a stranger, without connecting himself with it and then offer proof of open, notorious, continuous adverse possession, under color of

Proof of a cloud on title is not enough.[15] The failure of defendant to show title cannot avail.[16]

title in himself, and those under whom he claims, for seven years before the action was brought (citing cases).

"4. He may show, as against the state, possession under known and visible boundaries, for thirty years, or, as against individuals, for twenty years, before the action was brought (citations).

"5. He can prove title by estoppel as by showing that the defendant was his tenant, or derived his title through his tenant, when the action was brought (citations).

"6. He may connect the defendant with a common source of title and show in himself a better title from that source" (citations).

[15] Pixley *v.* Rockwell, 1 Sheld. Buff. Super. Ct. 267.

An instruction to the jury, viz.: "You are the judges of the weight of the evidence, and the credibility of the witnesses, and you will find for the parties in whose behalf the evidence preponderates, upon the issues submitted to you" is clearly erroneous, as it places upon defendants the burden of proof as to their right to the premises. The burden of proof is upon plaintiff and if he fails to make out his case by a preponderance of the testimony or if the scales are equally balanced, defendant is entitled to verdict. Robinson *v.* Nail, 2 Ind. T. 509, 52 S. W. Rep. 49.

[16] Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. Rep. 255; Clayton *v.* Feig, 54 N. E. Rep. 149, 179 Ill. 534; Brady *v.* Hennion, 8 Bosw. 528; Tyl. Ej. 72; Watts *v.* Lindsey, 7 Wheat. 158. But a party who, while in peaceable possession, was ousted by the defendant may recover merely upon his possession. In order to prevail, defendant must show that he has the legal title or authority to enter thereunder. McMurray *v.* Dixon, 105 Va. 605, 54 S. E. Rep. 481. A defendant in possession may defeat a recovery by a plaintiff in ejectment who relies upon his title by proof of an outstanding title in a third person, but such outstanding title must be subsisting and valid as against the plaintiff at the time of the trial, but need not be so as against the defendant. Henderson *v.* Wanamaker, 49 U. S. App. 474, 79 Fed. Rep. 736.

A title shown to exist in a third person must be a present subsisting and operative legal title in order to defeat the plaintiff. The burden is on the defendant to establish such a title if he would use it. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. Rep. 255.

Where defendant in possession claimed under and proved a senior mortgage he cannot be defeated even though he has not succeeded to the legal title of the senior mortgagee. New England Mortg. Security Co. *v.* Clayton, 119 Ala. 361, 24 So. Rep. 362. But see

Under the new procedure plaintiff may recover on an equitable title.[17] He may prove two titles, although either, if established, would be enough.[18] A variance in alleging the nature of the title,[19] or the proportion of plaintiff's interest, is not fatal.[20]

Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513.

A deed of trust is not such an outstanding legal title as will defeat a recovery as between persons who do not claim under it. Benton Land Co. *v.* Zeitler, 182 Mo. 251, 81 S. W. Rep. 193, 70 L. R. A. 94.

As to when equitable defenses in third persons are available defenses, see East *v.* Peden, 108 Ind. 92, 8 N. E. Rep. 722; Aurora Bank *v.* Linzee, 166 Mo. 496, 65 S. W. 735.

A mere intruder upon the notorious adverse possession of another cannot protect his trespass and intrusion under an outstanding title in a stranger. Sullivan *v.* Eddy, 164 Ill. 391, 45 N. E. Rep. 837.

A mere trespasser cannot set up an outstanding title in another. Casey *v.* Kimmel, 54 N. E. Rep. 905, 181 Ill. 154.

The law is well settled that where two or more persons sue for land jointly and severally, the one showing title may recover although the others do not. It is otherwise where the suit is joint. Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. Rep. 44; see also DeVaughn *v.* McLeroy, 82 Ga. 687, 10 S. E. Rep. 211.

[17] Skinner *v.* Terry, 46 S. E. 517, 134 N. C. 305; Pope *v.* Nichols, 61 Kan. 230, 59 Pac. Rep. 257; Whitehead *v.* Callahan, 44 Colo. 396, 99 Pac. Rep. 57; Phillips *v.* Gorham, 17 N. Y. 270; Lattin *v.* McCarty, 41 N. Y. 107, rev'g 8 Abb. Pr. 225, s. c., 17 How. Pr. 239; Sheehan *v.* Hamilton, 4 Abb. Ct. App. Dec. 211.

The common-law rule, which is otherwise, still obtains in some of the states. Martin *v.* Kitchen, 195 Mo. 477, 93 S. W. Rep. 780; Nalle *v.* Thompson, 173 Mo. 595, 73 S. W. Rep. 599; Fenn *v.* Holme, 21 How. (U. S.) 481, 16 L. ed. 198; Harrison *v.* Alexander, 135 Ala. 307, 33 So. Rep. 543; Stone *v.* Perkins, 85 Fed. Rep. 616; Sharpe *v.* Brantley, 123 Ala. 105, 26 So. Rep. 289.

Where a strict legal title must be shown, laches cannot be pleaded as a defense. Waits *v.* Moore, 89 Ark. 19, 115 S. W. Rep. 931.

[18] Enders *v.* Sternbergh, 2 Abb. Ct. App. Dec. 31, rev'g 52 Barb. 222; Sunol *v.* Hepburn, 1 Cal. 254.

[19] Chapman *v.* Delaware, &c. R. R. Co., 3 Lans. 261. *Contra*,

[20] Lewis *v.* McFarland, 9 Cranch, 151; Hinman *v.* Booth, 21 Wend. 266, 267; Ryerss *v.* Wheeler, 22 Id. 148. *Contra*, Gillet *v.* Stanley, 1 Hill, 121; Cole *v.* Irvine, 6 Id. 634.

The plaintiff must set forth in the complaint the nature and extent

2. Title of State.

In ejectment by the state, evidence that the premises were vacant and wholly unoccupied at a time within forty years before action brought, and that defendant was in possession when the action was brought, is *prima facie* sufficient,[21] if it does not appear that the title of the state was ever divested.[22]

3. Possession as Evidence of Title.

Mere general possession of land, unexplained, is *prima facie* evidence of ownership,[23] in the absence of any other

Patterson *v.* Keystone, &c. Co., 30 Cal. 360, 364. Compare Cruger *v.* McLaury, 41 N. Y. 219, affi'g 51 Barb. 642.

Proof of an equitable title under an allegation of a legal title is not a variance. Pope *v.* Nichols, 61 Kan. 230, 59 Pac. Rep. 257.

Where the plaintiff in an action to recover possession of land alleges in his petition that he is the owner under written evidence of title, an amendment to the petition, founding his ownership on equitable grounds, is allowable. Such an amendment does not set forth a new cause of action. McCandless *v.* Inland Acid Co., 115 Ga. 968, 42 S. E. Rep. 449.

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of his title, estate or interest in the property. Dunn *v.* Sullivan, 23 R. I. 605, 51 Atl. Rep. 203. See Olin *v.* Henderson, 120 Mich. 149, 79 N. W. Rep. 178; and Austin *v.* Schluyter, 7 Hun, 275.

[21] Wendell *v.* Jackson, 8 Wend. 183, affi'g 5 Id. 142.

Patents are presumptive evidence that title to wild and unoccupied lands was in the state at the time they were issued. Hewitt *v.* Butterfield, 52 Wis. 384, 9 N. W. Rep. 15.

[22] See People *v.* Snyder, 51 Barb. 589, affi'd in 41 N. Y. 397.

A decree of distribution of an escheated estate does not prove sufficient title in a plaintiff to maintain ejectment where the deceased's title was not traced to the government, a grantor in possession or a common source of title as such distribution conveys only such title as the deceased actually had. Helm *v.* Johnson, 40 Wash. 420, 82 Pac. Rep. 402.

The deed of a government officer, executed in his official capacity, passes to the grantee only such title as the government may have in the property. There is no legal presumption that the title is valid. Sabariego *v.* Maverick, 124 U. S. 261, 8 S. Ct. 461, 31 L. ed. 430.

[23] COWEN, J., Northrop *v.* Wright, 24 Wend. 221, rev'd on other grounds in 7 Hill, 476; Hill *v.* Draper, 10 Barb. 454. The presumption, in the absence of evi-

evidence as to title; especially if coupled with actual improvement.[24] But to raise a presumption of any particular kind of title or degree of interest, the evidence of possession must be coupled with evidence of a claim of title.[25] The question of possession by one other than the owner of the legal title involves a conclusion of law which cannot be stated by a witness, but is to be drawn from the facts.[26] Evidence that a place was generally known by the name of a man is competent in aid of other evidence of his possession.[27] When no legal title is shown, the party showing the

dence to the contrary, is that such possession is in accord with the record title. Waits *v.* Moore, 89 Ark. 19, 115 S. W. Rep. 931. *Contra,* Delancey *v.* McKeen, 1 Wash. C. Ct. 354. But as against a naked trespasser, it is agreed that possession is enough. Burt *v.* Panjaud, U. S. Supreme Ct. 99 U. S. (9 Otto) 180.

A person in possession under a bond for title is in legal and rightful possession, if he is not in default under the terms of the bond, and can set up his right thereunder as a defense to an action of ejectment by a subsequent grantee. Bolton *v.* Roebuck, 27 So. Rep. 630, 77 Miss. 710.

"Possession, with claim of ownership, is not only evidence of title, but is title itself in a low degree." Christy *v.* Richolson, 48 Kan. 177, 29 Pac. Rep. 398.

[24] Sherry *v.* Frecking, 4 Duer, 452; Allred *v.* Elliott, 71 Ala. 224. Payment of taxes and survey, etc., not evidence of possession. Thompson *v.* Burhans, 61 N. Y. 52, rev'g 61 Barb. 260. *Contra,* Hodgdon *v.* Shannon, 44 N. H. 572. Parol evidence is not admissible to show who the grantor was in a deed of certain land, but a witness may be asked from whom a certain party got possession of the land—possession being a fact provable by parol. Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. Rep. 166. A written memorandum by a deceased person relating to the possession of a building, which possession was a point in controversy, is not admissible when not made in the course of such person's business or duty. (Id.) Unsuccessful attempt to interrupt possession strengthens the presumption. Sargent *v.* Seagrave, 2 Curt. C. Ct. 553.

[25] Ricard *v.* Williams, 7 Wheat. 59, 105.

[26] Arents *v.* Long Island R. Co., 156 N. Y. 1, 50 N. E. Rep. 422; Thistle *v.* Frostburg Coal Co., 10 Md. 129.

Possession may be shown by circumstantial evidence. Williamson *v.* Mosley, 110 Ga. 53, 35 S. E. Rep. 301.

[27] Russell *v.* Jackson, 22 Wend. 276, affi'g 4 Id. 543. But title cannot be proved by showing the reputation in the community as

prior possession is held to have the better right.[28] Mere possession may be rebutted by parol evidence of abandonment,[29] but the evidence should be clear.[30] Where occu-

to ownership. Metz *v.* Metz, 48 S. C. 472, 26 S. E. Rep. 787. See Sullivan *v.* Eddy, 164 Ill. 391, 45 N. E. Rep. 837.

[28] Tyl. Ej. 72, 204; Tapscott *v.* Cobbs, 11 Gratt. (52 Va.) 172; Smith *v.* Hicks, 139 Cal. 217, 73 Pac. Rep. 144; Hubbard *v.* Godfrey, 100 Tenn. 150, 47 S. W. Rep. 81; Christy *v.* Richolson, 48 Kan. 177, 29 Pac. Rep. 398; Hall *v.* Gallemore, 138 Mo. 638, 40 S. W. Rep. 891.

Where the plaintiff testified: "I went into possession of it only by leasing it to Mr. Hilton for turpentine purposes, for three years, and putting him into possession. He commenced cutting it about two years after I leased it to him. During the time Hilton was working the land for turpentine I sold it to Emily J. Tipton. She never went into possession of it, but sued me to set aside the sale. I never abandoned my claim to the lot, and after the suit Tipton brought against me terminated, I tried to place a tenant in possession of the lot, but did not succeed in doing it," the testimony was held insufficient to show prior possession of the land in the plaintiff. Knight *v.* Isom, 113 Ga. 613, 39 S. E. Rep. 103.

Prior possession is sufficiently shown by evidence of actual possession of part of the premises under color of title describing the whole tract. Bowling *v.* Mobile, etc., Ry. Co., 128 Ala. 550, 29 So. Rep. 584.

Actual prior possession results when there is a subjection to the will and dominion of the claimant. While actual physical occupancy may be the highest evidence of such a subjection, it is not the only evidence. Thus where a claimant upon the face of the county records has color of title to the land, is regarded as the owner in the neighborhood, has paid taxes for many years and disposed of the hay and other products, there is such a subjection as will entitle him to possession as against an intruder. Robinson *v.* Gantt, 1 Nebr. (Unoff.) 51, 95 N. W. Rep. 506.

An heir at law may recover on the prior possession of his ancestor, but in order to make out a *prima facie* case, it must appear that the ancestor was in possession under a *bona fide* claim of right at the date of his death. Watkins *v.* Nugen,

[29] Onderdonk *v.* Lord, Hill & D. Supp. 129.

The abandonment by an adverse holder, whether before or after the completion of the statutory bar in his favor, has been held to terminate his rights over the property. Williamson *v.* Mosley, 110 Ga. 53, 35 S. E. Rep. 301.

[30] Corning *v.* Troy Iron & Nail Factory, 39 Barb. 311, affi'd in 40 N. Y. 191.

pation is once established, its continuance may be inferred.[31]

When legal title to unoccupied land is shown, possession is presumed to be in him who is shown to have the title.[32] This is constructive possession, and does not avail where actual possession must be shown.[33]

4. Title by Deed.

To prove title by deed, plaintiff must show a deed which satisfies the requirements of the law of the state where the land lies.[34] The deed may be proved by producing either the original,[35] or the record, or a certified copy from the

118 Ga. 375, 45 S. E. Rep. 260.

The right, based on prior possession, is not defeated by a subsequent entry and occupation by the opposing claimant, unless such entry has ripened into adverse possession. McCreary *v.* Jackson Lumber Co., 148 Ala. 247, 41 So. Rep. 822. See also Bradshaw *v.* Ashley, 14 App. D. C. 485.

[31] Stackhouse *v.* Stotenbur, 22 App. Div. (N. Y.) 312.

A party who shows possession at one time in the history of the title is presumed to continue in possession until the suit is brought. Boagni *v.* Pacific Impr. Co., 111 La. 1063, 36 So. Rep. 129.

[32] Florence *v.* Hopkins, 46 N. Y. 182; Horbach *v.* Boyd, 64 Nebr. 129, 89 N. W. Rep. 644; Harison *v.* Caswell, 17 N. Y. App. Div. 252, 45 N. Y. Supp. 560; N. Y. Code Civ. Proc., § 368; Yost *v.* Brown, 126 Pa. St. 92, 17 Atl. Rep. 533; Deering *v.* Riley, 38 N. Y. App. Div. 164, 56 N. Y. Supp. 704.

[33] Paragraph 38. Constructive possession not applicable to large tracts not manageable according to the custom and business of the country. Thompson *v.* Burhans, 61 N. Y. 52, rev'g 61 Barb. 260.

[34] Compliance with the stamp act need not be proved in a state court. See chapter XXI, paragraph 126 of this vol.

The invalidity of a deed may be shown under a general denial. The party assailing the deed is entitled to have the instrument admitted in evidence. Hughes *v.* Hughes, 10 N. Y. Misc. 180, 30 N. Y. Supp. 937; Patton *v.* Fox, 169 Mo. 97, 69 S. W. Rep. 287.

[35] For mode of proof of handwriting, see chapter XXI, paragraphs 5–18 of this vol., and of execution in other respects, chapter XXVII, paragraphs 2–7. An original muniment of title produced from the public archives in which it is required by law to be deposited, certified by the public officer who has custody of it, and identified by him as a witness, is sufficiently authenticated to authorize it to be offered in evidence. Williams *v.* Conger, 125 U. S. 397. If the

record.[36] A certificate, which appears, on its face, to be in conformity with the statute, is presumptive proof of its own genuineness; and where it describes the proper officer acting in the proper place, it is taken as proof both of his character

removal of a public record from its place of deposit is not prohibited by reason of public policy, it constitutes, when legitimately removed, the best evidence of its contents and of its authenticity. (Id.)

See N. Y. Code Civ. Proc., § 935.

By statute in some states, instruments affecting real property, which are properly executed, are admissible in evidence without further proof. McDougall *v.* McDougall, 135 Cal. 316, 67 Pac. Rep. 778; Cal. Code Civ. Proc., § 1951.

[36] Chamberlain *v.* Bradley, 101 Mass. 188, s. c., 3 Am. Rep. 331. The mode of proof by the record or certified copy varies according to the local statutes, which should be consulted. Under the New York statutes and many others the following rules apply. The deed must be either acknowledged or witnessed. Roggen *v.* Avery, 63 Barb. 65. Compare Fryer *v.* Rockfeller, 63 N. Y. 268; N. Y. Code Civ. Proc., § 935. If the *original* is offered in evidence, a certificate of acknowledgment, or of proof by living subscribing witness (even though made after action brought, p. 26 of this vol.) is primary evidence (see Clark *v.* Nixon, 5 Hill, 36), but not conclusive. N. Y. Code Civ. Proc., § 936. *Contra*, in some states (see p. 503 of this vol.); but a county clerk's certificate is necessary to read the original in evidence in any other county than that in which the officer taking the acknowledgment, etc., resided (1 N. Y. Rev. St. 759 [2 Id. 6th ed. 1146], § 18; Wood *v.* Weiant, 1 N. Y. 77). If a certificate of proof by a subscribing witness is relied on, it will be nullified by evidence that the witness was interested or incompetent. N. Y. Code Civ. Proc., § 936. A transcript or *certified copy* of the record if produced, duly certified by the recording officer under seal, N. Y. Code Civ. Proc., §§ 933, 935, is equally competent as the original instrument, provided the acknowledgment or proof was sufficient to entitle to record; otherwise not. Carpenter *v.* Dexter, 8 Wall. 513. If the proof was by evidence of handwriting after death of the subscribing witnesses, the original is the only primary evidence, and must be produced and duly proved at the trial, or accounted for, and secondary evidence given (1 N. Y. Rev. St. 761 [2 Id. 6th ed. 1150], §§ 30–33). The manner in which the *record* may be produced is defined by N. Y. Code Civ. Proc., § 866. The omission, from the record, of the memorandum of alterations before execution is relevant to the question of alteration after execution, Hager *v.* Hager, 38 Barb. 92, 98. Where the acknowledgment and

and local jurisdiction.[37] A record or certified copy, which by reason of defect is not competent as such, may, nevertheless, be available as secondary evidence on proof of the loss of the original.[38] A substantial compliance of the certificate with the statute is sufficient.[39]

date of registry of a deed are in dispute, proving it by a certified copy, without producing or accounting for the original, is a circumstance of suspicion which is a proper subject of comment. 5 Wall. 85. A certified copy of a deed, properly acknowledged when made, but not in conformity with the law when recorded, is admissible in evidence without proof of execution, where it appears that the deed had been recorded more than 30 years. Plaster *v.* Rigney, 97 Fed. Rep. 12, 38 C. C. A. 25.

[37] The record is admissible even though the deed was recorded during the pendency of the action. Betts *v.* Dick, 17 Del. 268, 40 Atl. Rep. 185; Thurman *v.* Cameron, 24 Wend. 87, and cases cited.

The certificate of the statute acknowledgment, appearing upon a recorded deed, does not dispense with other proof of its execution when offered by the grantee therein as evidence of title. Webber *v.* Stratton, 89 Me. 379, 36 Atl. Rep. 614; see also Burk *v.* Pence, 206 Mo. 315, 104 S. W. Rep. 23.

[38] Jackson *v.* Rice, 3 Wend. 180, 182.

In the absence of proof that the original deed has been lost or destroyed or that any effort has been made to produce it, a copy thereof is inadmissible. Branch *v.* Smith, 114 Ala. 463, 21 So. Rep. 123; Florida Finance Co. *v.* Sheffield, 56 Fla. 285, 48 So. Rep. 42, 23 L. R. A. N. S. 1102, 16 Ann. Cas. 1142.

The due execution and genuineness of the alleged lost instrument must be shown before secondary evidence of it can be admitted. It must also appear that the paper is lost and cannot be found. Helton *v.* Asher, 103 Ky. 730, 46 S. W. Rep. 22, 82 Am. St. Rep. 601.

[39] Raverty *v.* Fridge, 3 McLean, 245, and cases cited; Carpenter *v.* Dexter, 8 Wall. 513. A deed improperly recorded cannot be read in evidence. Irving *v.* Campbell, 121 N. Y. 353, 361, 24 N. E. Rep. 821; Morris *v.* Keyes, 1 Hill, 540; Clark *v.* Nixon, 5 Hill, 36. Neither a certified copy of a power of attorney, recorded in the register's office, nor the record itself produced from such office, is competent evidence of the existence of the power of attorney, there being no provision of law requiring such a paper to be recorded in the register's office. Striker *v.* Striker, 31 App. Div. (N. Y.) 129.

If the certificate falls short of the statutory requirements and is defective, the officer making it may be called to testify as a subscribing witness to prove the execution of the deed. Middlebrook

In aid of a certificate of acknowledgment, reference may be had to any part of the instrument itself.[40] An error in venue may be cured by oral evidence.[41] Evidence of the official character of the certifying officer need not be added to his certificate, unless required by the statute.[42]

5. Delivery and Date.

Under a denial, the burden is on plaintiff to prove delivery;[43] but an admission of execution without more usually admits delivery.[44] In addition to what has already been

v. Barefoot, 121 Ala. 642, 25 So. Rep. 102.

[40] Carpenter *v.* Dexter, 8 Wall. 513, S. P., 12 Serg. & R. 48. For instance, a defect in the venue of the certificate may be supplied by a presumption drawn from a statement of the place of execution in the title or testificandum clause of the deed. Carpenter *v.* Dexter (above); Brooks *v.* Chaplin, 3 Vt. 281. And the omission to certify that the person making the acknowledgment was known to the officer to be the one who executed the deed, by reference to the fact that the officer's name (without addition) appears as subscribing witness under a clause stating that the deed was "signed," etc., in his presence. Carpenter *v.* Dexter (above); and see Luffborough *v.* Parker, 12 Serg. & R. 48.

Where a deed is inoperative as a conveyance because of absence of attestation or acknowledgment, it is inadmissible as evidence of title in ejectment. Branch *v.* Smith, 114 Ala. 463, 21 So. Rep. 123.

[41] Angier *v.* Schieffelin, 72 Penn. St. 106, s. c., 13 Am. Rep. 659. Evidence to impeach the acknowledgment of a deed should be of the clearest, strongest and most convincing character. It should be almost as strong as that required to correct an alleged mistake in a deed, and should not be loose, equivocal, or open to reasonable doubt or opposing presumptions. Pickens *v.* Knisely, 29 W. Va. 1, 6 Am. St. Rep. 622, 11 S. E. Rep. 932.

"A presumption arises that a deed is forged where it is shown by certificates from the executive department that, at the date of its execution, there was not in commission as justice of the peace, in the county where it purports to have been made, any such person as the one who attested it in that official capacity." Parker *v.* Waycross, etc., R. Co., 81 Ga. 387, 8 S. E. Rep. 871.

[42] Secrist *v.* Green, 3 Wall. 744, 750; Carpenter *v.* Dexter (above).

[43] Burkholder *v.* Casad, 47 Ind. 418.

[44] See Robert *v.* Good, 36 N. Y. 408, affi'g 2 Daly, 64; Colee *v.* Colee, 122 Ind. 109, 23 N. E. Rep. 687, 17 Am. St. Rep. 345; Smith *v.*

said,[45] possession by the grantee,[46] and the fact of record,[47] are each competent and sufficient *prima facie* evidence of delivery, as against the grantor.[48] Subsequent conduct of the parties to the action recognizing the title as transferred, are competent to show ratification of a delivery shown only by record.[49] The statutory acknowledgment or proof and the recording of a deed are not conclusive evidence of delivery or acceptance. Nor are they sufficient alone against the absolute testimony of the supposed grantee denying delivery and acceptance.[50]

James, 131 Ind. 131, 30 N. E. Rep. 902.

[45] Chapter XXVII, paragraphs 6 and 10 of this vol.

[46] Flagg *v.* Mann, 2 Sumn. 486, 509; Buckley *v.* Carlton, 6 McLean, 125.

The possession of the deed and the land thereby conveyed raises a presumption of the due delivery of the deed. Lewis *v.* Watson, 98 Ala. 479, 13 So. Rep. 570, 39 Am. St. Rep. 82, 22 L. R. A. 297. See also Devereux *v.* McMahon, 108 N. C. 134, 146, 12 S. E. Rep. 902, 12 L. R. A. 205.

[47] Chamberlain *v.* Bradley, 101 Mass. 188, s. c., 3 Am. Rep. 331; Kille *v.* Ege, 79 Penn. St. 15; Younge *v.* Guilbeau, 3 Wall. 636. Even though at the grantor's request. Bulkley *v.* Buffington, 5 McLean, 457.

The record of a deed is itself presumptive proof of its delivery. Allen *v.* Hughes, 106 Ga. 775, 32 S. E. Rep. 927, and cases cited. See also Valter *v.* Blavka, 195 Ill. 610, 63 N. E. Rep. 499.

[48] See Parmelee *v.* Simpson, 5 Wall. 81, 85.

The delivery of a deed may be legitimately inferred from the dealings of the grantee with the property, the fact that the conveyance was beneficial to him and other surrounding circumstances. Benton Land Co. *v.* Zeitler, 81 S. W. Rep. 193, 182 Mo. 251, 70 L. R. A. 94.

[49] Gould *v.* Day, 94 U. S. (4 Otto) 405. As to the declarations of a former owner, see paragraph 30, and chapter XXI, paragraph 29 of this vol.

If part of the *res gestæ:* Renshaw *v.* Dignan, 128 Iowa, 722, 105 N. W. Rep. 209; Piercy *v.* Piercy, 18 Cal. App. 751, 124 Pac. Rep. 561.

But the declarations of a grantor, if introduced to show his state of mind when he executed the deed, need not be part of the *res gestæ* to be admissible. Piercy *v.* Piercy, 18 Cal. App. 751, 124 Pac. Rep. 561.

[50] Jackson *v.* Perkins, 2 Wend. 308; Younge *v.* Guilbeau, 3 Wall. 636, 641. For other cases on presumption of delivery, see Rogers *v.* Carey, 47 Mo. 232, s. c., 4 Am. Rep. 322.

Such acknowledgment does not dispense with necessity of adducing other proof of the execution

The rule excluding oral evidence to contradict a writing does not exclude oral evidence of delivery or non-delivery of the writing;[51] but it does exclude oral evidence that delivery to the party himself[52] was on an oral condition nullifying the delivery.[53]

The time of delivery is the time at which the deed takes effect (unless the court, on equitable grounds, give it relation back to an earlier date);[54] and, in the absence of other evidence, the date written in[55] an attested or acknowledged

of the deed. Webber *v.* Stratton, 89 Me. 379, 36 Atl. Rep. 614.

[51] Roberts ads. Jackson, 1 Wend. 478, 480; Stephens *v.* Buffalo & N. Y. City R. R. Co., 20 Barb. 332. To disprove acceptance of a deed of trust, an unsealed declaration by the intended trustee (a stranger to the action) that immediately on receiving notice of it he did refuse to accept and had never acted (the paper being proved and recorded), is competent as a verbal act tending to show non-acceptance. Armstrong *v.* Morrill, 14 Morrill, 14 Wall. 120, 139. This was held, although the declaration bore date 11 years after the date of the deed of trust, and was proved nearly 50 and recorded more than 60 years after the date of the deed of trust.

The question in these cases is not whether conditions were attached to a delivery, but as to whether there was a delivery at all. Creveling *v.* Banta, 138 Iowa, 47, 115 N. W. Rep. 598.

Plaintiff may testify to the execution of a deed which presumes delivery. Louisville, etc., R. Co. *v.* Summer, 106 Ind. 55, 62, 5 N. E. Rep. 404, 55 Am. Rep. 719.

A conveyancer may testify that deeds were signed, acknowledged, and witnessed in his presence. Gardiner *v.* Gardiner, 134 Mich. 90, 95 N. W. Rep. 973.

It is not error to allow a witness, who was present at the time of the execution, to testify: "It (the deed) was signed, sealed and delivered and to the best of my belief it was delivered February 4, 1867," and also "Simeon Bell, William B. Hankinson, Simon Wallace, J. P., and Henry Bell, a son of Simon Bell, were present and to the best of my recollection Seaborn J. Bell was also there." Brinkley *v.* Bell, 131 Ga. 226, 62 S. E. Rep. 67.

[52] See, as to delivery to attorney or agent, Ford *v.* James, 2 Abb. Ct. App. Dec. 159; Watkins *v.* Nash, L. R. 20 Eq. Cas. 262, s. c., 13 Moak's Eng. R. 781.

[53] Worrall *v.* Munn, 5 N. Y. 229, and cases cited.

[54] County of Calhoun *v.* American Emigrant Co., 93 U. S. (3 Otto) 124, 127.

[55] Or a later date inscribed by the grantor upon the stamp for cancellation. Van Rensselaer *v.* Vickery, 3 Lans. 57; Williams *v.* Armstrong, 130 Ala. 389, 30 So.

instrument [56] is presumptively the date of delivery,[57] notwithstanding its acknowledgment,[58] or its record [59] is of later date.

If the deed is shown to have been antedated (and the fact that it remained in the grantor's hands after the day of its date is sufficient evidence of this),[60] the presumption is removed, and the burden is on the party claiming under it to show the date of delivery, if the validity or effect of the deed depends on that.[61] Slight evidence drawn from the transaction itself may be sufficient for this purpose.[62]

6. — Parties.[63]

In addition to what has been said as to the proof of iden-

Rep. 553 (a deed dated on a Sunday).

[56] Otherwise of a deed in fee, unattested and unacknowledged. Genter *v.* Morrison, 31 Barb. 155.

By statute in some states, see, for instance, Cal. Civ. Code, § 1055. McDougall *v.* McDougall, 135 Cal. 316, 67 Pac. Rep. 778.

[57] Robinson *v.* Wheeler, 25 N. Y. 252, and cases cited; People *v.* Snyder, 41 N. Y. 397, affi'g 51 Barb. 589; Williams *v.* Armstrong, 130 Ala. 389, 30 So. Rep. 553.

The deed having been introduced in evidence, a question to a witness as to when a party acquired the property calls for a conclusion and is improper. Lecroix *v.* Malone, 157 Ala. 434, 47 So. Rep. 725.

Deed dated on Sunday. Ten-Eyck et al. *v.* Whitbeck, 35 N. Y. Supp. 1013.

[58] People *v.* Snyder (above); Ewers *v.* Smith, 98 App. Div. 289, 90 N. Y. Supp. 575.

Not all of the states, however, agree upon this point. In Iowa, for instance, the date of the subsequent acknowledgment controls. Crabtree *v.* Crabtree, 136 Iowa, 430, 113 N. W. Rep. 923, 15 Ann. Cas. 149.

[59] Robinson *v.* Wheeler (above).

[60] Harris *v.* Norton, 16 Barb. 264.

[61] Costigan *v.* Gould, 5 Den. 290.

[62] McGowan *v.* Smith, 44 Barb. 232; Jackson *v.* Schoonmaker, 2 Johns. 230. Whether the date in a deed by an entire stranger to the parties is sufficient when the competency of the instrument in evidence depends on the time of the delivery, compare with these cases, chapter I, paragraph 35, of this vol.

[63] Whether showing that the grantee's name was not inserted in the blank until after attestation and acknowledgment and parting with possession by the grantor, affects the validity of the deed, see, for the *affirmative*, Upton *v.* Archer, 41 Cal. 85, s. c., 10 Am. Rep. 266; Moore *v.* Bickham, 4 Binn. (Pa.) 1; U. S. *v.* Nelson, 2

tity,[64] it should be added here, that if there are two persons, father and son, of the same name, the use of the name without addition means presumptively, in the absence of other evidence, the father;[65] but this presumption may be rebutted by showing that the parties intended the son by the name in the deed.[66] A difference in surname, too great to be disregarded as involving no substantial difference in sound, cannot be cured by parol evidence,[67] unless the evidence is sufficient for relief in equity.[68] Omission of middle name is not material.[69] If the true owner conveys by any name, the conveyance, as between the grantor and grantee, will transfer title, and in all cases evidence *aliunde* the instrument is admissible to identify the actual grantor. The admission of such evidence does not change the written instrument, or add new terms to it, but merely fixes and applies terms already contained in it.[70]

Brock. 64; Coit *v.* Starkweather, 8 Conn. 289; Davenport *v.* Sleight, 2 Dev. & B. (N. C.) L. 381; Chase *v.* Palmer, 29 Ill. 306; Burns *v.* Lynde, 6 Allen (Mass.), 305; Basford *v.* Pearson, 9 Id. 387; Drury *v.* Foster, 2 Wall. 24; 2 Parsons on Cont., citing Hibblewhite *v.* McMorone, 6 M. & W. 200; Douthitt *v.* Stinson, 63 Mo. 268; and for the *negative*, Van Etta *v.* Evenson, 28 Wis. 33, s. c., 9 Am. Rep. 486; Owen *v.* Perry, 25 Iowa, 412; Pence *v.* Arbuckle, 22 Minn. 417; McNab *v.* Young, 81 Ill. 11; Hemmenway *v.* Mulock, 56 How. Pr. 38; Vanderbilt *v.* Vanderbilt, 54 Id. 250; and see Field *v.* Stagg, 52 Mo. 534, s. c., 14 Am. Rep. 435; Preston *v.* Hull, 23 Gratt. (Va.) 600.

[64] Chapter V, paragraph 49, of this vol.

[65] Padgett *v.* Lawrence 10 Paige, 170; Stevens *v.* West, 6 Jones (N. C.) L. 49; Hess *v.* Stockard, 99 Minn. 504, 109 N. W. Rep. 1113; Doty *v.* Doty, 159 Ill. 46, 42 N. E. Rep. 174; Fyffe *v.* Fyffe, 106 Ill. 646. But see Simpson *v.* Dix, 131 Mass. 179.

[66] Padgett *v.* Lawrence (above); Begg *v.* Anderson, 64 Wis. 207, 25 N. W. Rep. 3.

[67] Jackson *v.* Hart, 12 Johns. 77; and see Jackson *v.* Boneham, 15 Id. 226; Babcock *v.* Pettibone, 12 Blatchf. 354.

[68] See chapter XXVII, paragraph 19 and Chapter on REFORMATION FOR MISTAKES, &c.

[69] Games *v.* Dunn, 14 Pet. 322. Or where the middle initial of a name is wrong. Morrison *v.* Turnbaugh, 192 Mo. 427, 91 S. W. Rep. 152.

[70] Wakefield *v.* Brown, 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. Rep. 788; Hommel *v.* Devinney, 39 Mich. 522; Nixon *v.* Cobleigh,

Oral evidence is competent to show which was intended, where two persons answer the same name;[71] or where two names, having sufficient resemblance, appear, and it does not appear that there were two persons corresponding; but if it appear that there were two such persons, oral evidence is not competent to show that one was intended by the name of the other.[72]

To admit a deed purporting to be executed by the attorney of the party to be bound, there must be some evidence of his authority,[73] but it may be presumed from a recital, in the deed, of a power of attorney and from long possession under the deed.[74] Where a deed is executed under a power, and so far as appears from the two instruments was executed agreeably to it, the burden is upon him assailing the deed to show that conditions specified in the power were not performed.[75]

52 Ill. 387; Lyon *v.* Kain, 36 Ill. 362, 369; Middleton *v.* Findla, 25 Cal. 76, 81; Fallon *v.* Kehoe, 38 Cal. 44, 99 Am. Dec. 347; Staak *v.* Sigelkow, 12 Wis. 234; Morse *v.* Carpenter, 19 Vt. 613; Fletcher *v.* Mansur, 5 Ind. 267; Janes *v.* Whitbread, 11 Com. B. 406, 411; Elliott *v.* Davis, 2 Bos. & P. 338; Reynolds *v.* Wynne, 121 App. Div. 272, 105 N. Y. Supp. 849; Andrews *v.* Dyer, 81 Me. 104, 16 Atl. Rep. 405.

[71] Jackson *v.* Goes, 13 Johns. 518; Delaney *v.* Gaylord, et al., 131 N. Y. Supp. 890; Grand Gulf R., etc., Co. *v.* Bryan, 16 Miss. 234.

Declarations of the grantor to a third person, antedating the conveyance, are inadmissible to show his understanding of the right party; but evidence that the deed was delivered to one of the parties is admissible. Kingsford *v.* Hood, 105 Mass. 495; Luty *v.* Cresta, 4 Cal. App. 589, 88 Pac. Rep. 642.

[72] Jackson *v.* Hart, 12 Johns. 77; Grand Gulf R., etc., Co. *v.* Bryan, 16 Miss. 234 at 276.

[73] Denn *v.* Reid, 10 Pet. 524.

[74] Doe *v.* Phelps, 9 Johns. 169; Doe *v.* Campbell, 10 Id. 475; and see Forman *v.* Crutcher, 2 A. K. Marsh. (Ky.) 69. Possession is essential. McKinnon *v.* Bliss, 21 N. Y. 206.

Recitals in deeds, including facts of birth, marriage and death, are admissible as original evidence when they are offered for purposes of identification. Auerbach *v.* Wylie, 84 Tex. 615, 19 S. W. Rep. 856, 20 S. W. Rep. 776.

[75] Clements *v.* Macheboeuf, 2 U. S. 92 (Otto), 418, and cases cited. Compare Morrill *v.* Cone, 22 How. (U. S.) 75.

7. — Alterations.

An unexplained alteration appearing on the face of an instrument does not render the deed incompetent as evidence of a transfer of title. It is not error to let the instrument go to the jury.[76] In so far as a deed operates as a present transfer of title, an alteration, though fraudulently made by the grantee subsequent to delivery, cannot operate as a re-conveyance to divest the title once vested; but, if at all, by way of estoppel, or as having destroyed the evidence necessary to manifest the transfer. On the other hand, so far as the deed is executory,—as for instance in case of a covenant of warranty relied on to pass, by way of estoppel, an after-acquired title,—a material alteration fraudulently made by the grantee, annuls the covenant itself thereafter.[77]

Oral evidence is competent alike to prove or to explain an

[76] Little *v.* Herndon, 10 Wall. 26, 31 (in this case cancellation of one number and interlineation of another in the description of premises in a deed), NELSON, J.; and see chapter XXI, paragraph 31 of this vol. After great conflict of opinion, the weight of recent authority is in harmony with sound general principles; and, without denying that an alteration may be so suspicious as to require the exclusion of the instrument if offered without explanation, ordinarily the court submits the instrument to the jury with whatever explanation may be afforded by the contents and appearance of the instrument itself, and by the extrinsic evidence, if any, adduced, leaving it for the jury to say whether the explanation is satisfactory. See Maybee *v.* Sniffen, 2 E. D. Smith, 1, s. c., 10 N. Y. Leg. Obs. 18; Herrick *v.* Malin, 22 Wend. 387, 393; Waring *v.* Smyth, 2 Barb. Ch. 119, 133; Smith *v.* McGowan, 3 Barb. 404, 407; Jackson *v.* Osborn, 2 Wend. 555, 559; 1 Whart. Ev., § 629.

The interlineation raises no presumption against the validity of the paper. But the burden of explaining the alteration is upon the party claiming the benefit of the writing and if he fails to explain it satisfactorily the proper conclusion is a conviction of fact against the instrument. Catlin Coal Co. *v.* Lloyd, 180 Ill. 398, 54 N. E. Rep. 214, 72 Am. St. Rep. 216.

[77] See opinion of CLIFFORD, J., in Smith *v.* U. S., 2 Wall. 219, 231, and cases cited; and 9 Cent. L. J. 173, note.

An alteration of a deed, after its delivery by the grantee, does not incapacitate him from bringing ejectment on it. Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513.

alteration in a deed; and, notwithstanding the statute of frauds to prove oral assent to an alteration;[78] and for these purposes, another than the subscribing witness is competent.[79]

8. — Connected Instruments.

Documents referred to in the deed and material to the title[80] should be produced, or their absence accounted for and secondary evidence given.[81] In case of loss, long possession, or even the terms,[82] or character, may enable the court to presume the contents and effect of the lost instrument.[83] A document made, by reference, part of a deed under which both parties claim, is admissible on proof of identity, without further proof of its execution.[84] A map referred to as recorded may be resorted to, to identify the premises, although the record was illegal.[85] If more than one map answering the reference exists, oral evidence to show

[78] Speake *v.* United States, 9 Cranch, 28; Robbins *v.* Locust Mountain Sav., etc., Assoc., 37 Pa. Super. Ct. 49.

[79] Penny *v.* Corwithe, 18 Johns. 499.

[80] Otherwise of an instrument merely directing the future disposition of the property. Duke of Cumberland *v.* Graves, 9 Barb. 595.

[81] Jackson *v.* Parkhurst, 4 Wend. 369; s. p., in the case of the bond recited in the mortgage. See paragraph 41, on Foreclosure.

[82] Jackson *v.* Lamb, 7 Cow. 431.

[83] McBurney *v.* Cutler, 18 Barb. 203.

[84] See Crawford *v.* Loper, 25 Barb. 449; Smith *v.* N. Y. Cent. R. R. Co., 4 Abb. Ct. App. Dec. 262.

Where the boundaries are incorrectly described in a patent, a document referred to therein may be produced to correct the error, where the intention of the parties can be gathered with reasonable certainty from the patent and document construed together. Hensley *v.* Burt, etc., Lumber Co., 132 Ky. 112, 116 S. W. Rep. 316.

[85] Noonan *v.* Lee, 2 Black. 499, 504. Compare Caldwell *v.* Center, 30 Cal. 539. As to whether the recorded plat referred to is conclusive against proving the original plat and a mistake in the record, see Jones *v.* Johnson, 18 How. (U. S.) 150.

A marginal description contained in a plan filed in the town clerk's office and referred to in a deed, cannot be resorted to, to limit the express terms of the deed. Fisk *v.* Ley, 76 Conn. 295, 56 Atl. Rep. 559.

what was intended, is competent.[86] A reference to premises as those previously conveyed to the grantor by another person, does not exclude oral evidence to identify the land, but does not allow of oral evidence of the parties' intention.[87]

9. — Consideration.

The consideration clause is not within the rule by which written evidence excludes oral;[88] but the nonpayment of the consideration stated, or its nominal character, is not relevant against the party claiming under the deed,[89] unless in connection with evidence showing equitable grounds for avoiding the transfer, for without such proof the grantor or those claiming under him cannot contradict the recital of

[86] Slosson *v.* Hall, 17 Minn. 95.

[87] Jackson *v.* Parkhurst (above); and see Reed *v.* McCourt, 41 N. Y. 435.

Thus, it has been held that a deed conveying "five hundred acres of land surveyed off the north side" of a certain tract sufficiently describes the premises, when that description is considered in connection with the deed to the grantor, which contains a definite description of the land. Davis *v.* Seybold, 195 Fed. Rep. 402, 115 C. C. A. 304.

[88] Adams *v.* Hull, 2 Den. 306. Therefore the true consideration and manner of payment may be shown by parol. Wilcox *v.* Priester, 68 S. C. 106, 46 S. E. Rep. 553. But the recital of consideration in a deed cannot be disproved for the purpose of raising a trust or defeating the operation of the instrument, in the absence of fraud or mistake. Feeney *v.* Howard, 79 Cal. 525, 12 Am. St. Rep. 162, 21 Pac. Rep. 984; Champlin *v.* Champlin, 136 Ill. 309, 29 Am. St. Rep. 323, 26 N. E. Rep. 526. Where a deed or assignment recites that it is given for "value received," such recital does not exclude parol evidence that the consideration for the conveyance was of an executory character, and consisted of a promise. Sullivan *v.* Lear, 23 Fla. 463, 11 Am. St. Rep. 388, 2 So. Rep. 846. Thus, parol evidence that limitation as to use of land entered into the consideration of a deed thereof is admissible, although the deed may be silent as to it. Sutton *v.* Head, 86 Ky. 156, 9 Am. St. Rep. 274, 5 S. W. Rep. 410.

[89] Meakings *v.* Cromwell, 2 Sandf. 512; Meriam *v.* Harsen, 2 Barb. Ch. 232, affi'g 4 Edw. Ch. 70; Childs *v.* Barnum, 11 Barb. 14, affi'g 1 Sandf. 58; S. P., Wood *v.* Chapin, 13 N. Y. 509.

consideration.[90] Hence the party claiming under a deed acknowledging a consideration need not in the first instance give any evidence of consideration,[91] unless he claims to be protected as *bona fide* purchaser for value;[92] and even then the acknowledgment in the deed of the receipt of the purchase money is sufficient *prima facie* evidence of its payment to bring him within the protection of the recording act,[93] though not to enable him to hold under a fraud committed by his grantor.[94] Extrinsic evidence of consideration[95]

[90] Grout *v.* Townsend, 2 Den. 336, affi'g 2 Hill, 554.

"To justify the setting aside of a conveyance solely on the ground of inadequacy of consideration, it must be very marked—so gross as to strike the understanding with the conviction that the transaction was not fair and *bona fide*. . . . In Underhill *v.* Horwood, 10 Ves. Jr. 209, 32 Reprint, 824, Lord Eldon said: 'if the terms are so extremely inadequate as to satisfy the conscience of the court that there must have been imposition or that species of pressure on the party's distress, which, in the view of the court, amounts to oppression, the court will order the instrument to be delivered up.'" Thornton *v.* Pinckard, 157 Ala. 206, 47 So. Rep. 289.

[91] Clarke *v.* Davenport, 1 Bosw. 95.

Such a recital of consideration is deemed evidence of its payment. Doody *v.* Hollwedel, 22 N. Y. App. Div. 456, 48 N. Y. Supp. 93.

[92] See paragraph 38.

[93] Wood *v.* Chapin, 13 N. Y. 509; Bolton *v.* Jacks, 6 Robt. 166, 234. Compare Ring *v.* Steele, 4 Abb. Ct. App. Dec. 68; Wood *v.* McClughan, 4 Supm. Ct. (T. & C.) 420, s. c., 2 Hun, 150.

The consideration named in the deed is *prima facie* evidence of the real value of the premises (Karsten *v.* Winkelman, 209 Ill. 547, 71 N. E. Rep. 45); and of the payment (Dodwell *v.* Mound City Sawmill Co., 90 Ark. 287, 119 S. W. Rep. 262).

But where the consideration is merely a promise, for instance, to support the grantor and her husband during their lifetime, the presumption does not exist. Maker *v.* Maker, 74 Me. 104.

Where the consideration for a deed was the promise of the grantee to nurse and take care of grantor (her sister), the courts will not set the instrument aside because the value of the property exceeded the value of the services. Griffin *v.* Nicholas, 224 Mo. 275, 123 S. W. Rep. 1063.

[94] Bolton *v.* Jacks (above); Lloyd *v.* Lynch, 28 Penn. St. 419.

[95] See other cases in Chapter LI.

The burden of proving a different consideration from that expressed in the deed is upon the party asserting it. Harraway *v.*

is competent in support of a deed;[96] and for this purpose the actual consideration, whether pecuniary,[97] or of blood,[98] or marriage,[99] may be proved by extrinsic evidence, although the deed express a different consideration,[1] or a nominal consideration,[2] or none.[3]

10. — Oral Evidence to Vary or Explain Writings.

In application of general principles already stated, it is to be observed that a conveyance of real property is not merely the voluntarily chosen expression of the intention of the parties, and therefore, as between them and those claiming under them, presumably the final definition of their intention,[4] but that it is also by statute the only

Harraway, 136 Ala. 499, 34 So. Rep. 836.

[96] Turner *v.* Lee, 254 Ill. 141, 98 N. E. Rep. 246; Ivy *v.* Ivy (Tex. Civ. A.), 128 S. W. Rep. 682.

[97] Hinde *v.* Longworth, 11 Wheat. 199; Jenkins *v.* Pye, 12 Pet. 241.

The rule which permits the recited consideration to be contradicted by oral testimony apparently does not apply where the effect of such testimony would be to destroy the deed by showing that the consideration was good instead of a valuable one. "If a deed shows a valuable consideration, such as money or other value, it must be taken to be a valuable consideration, and you will not be allowed to show a good consideration such as a gift for natural love and affection." Holloway *v.* Vincent, 143 Mo. App. 434, 128 S. W. Rep. 1009; Yates *v.* Burt, 161 Mo. App. 267, 143 S. W. Rep. 73.

[98] Goodell *v.* Pierce, 2 Hill, 659; and see Loeschigk *v.* Hatfield, 51 N. Y. 660, affi'g 5 Robt. 26, s. c., 4 Abb. Pr. N. S. 210.

[99] See Roberts *v.* Roberts, 22 Wend. 140.

The question as to whether a deed, the consideration for which is stated to be love for the grantee (wife) and $10, is a voluntary conveyance, depends upon the intention of the parties and extrinsic evidence of all the facts and circumstances surrounding the execution of the deed is freely admissible. Shackleford *v.* Orris, 135 Ga. 29, 68 S. E. Rep. 838.

[1] Bank of the United States *v.* Housman, 6 Paige, 526; Hinde *v.* Longworth (above).

Parol evidence, for instance, is admissible to show that the true consideration was an exchange of property and not one dollar. Harraway *v.* Harraway, 136 Ala. 499, 34 So. Rep. 836.

[2] Jenkins *v.* Pye (above).

[3] Goodell *v.* Pierce, 2 Hill, 659.

[4] For the limits and application of this principle, see chapter XVI, paragraph 8, chapter XXVI, paragraph 11 and chapter XXVII, paragraph 12 of this vol.

sufficient means of a voluntary transfer;[5] and therefore an intent to transfer real property cannot be imported into the deed by oral evidence; but oral evidence can only be used as a light to enable the court to read what is in the deed.[6] Hence, to enable the court to understand what was intended, but not to contradict what is unambiguously expressed,[7] oral evidence is competent to identity,[8] lo-

[5] N. Y. Real Property Law, § 242 *et seq.*

[6] Drew *v.* Swift, 46 N. Y. 204; Tymason *v.* Bates, 14 Wend. 671, rev'g 13 Id. 300; Bartlett *v.* Judd, 21 N. Y. 200, affi'g 23 Barb. 262; Stanley *v.* Green, 12 Call, 148, 162; Purkiss *v.* Benson, 28 Mich. 538; Mott *v.* Richmyer, 57 N. Y. 49. For fuller discussion of this principle, see Chapter V, paragraph 81 *et seq.*, of this vol.

Thus where the dimensions of a certain lot were in dispute, evidence of the dimensions of adjoining lots was held admissible as a circumstance tending to throw light upon the ownership of the property in controversy. Tebbs *v.* Wiseman, 112 S. W. Rep. 196. See Suttle *v.* Richmond, etc., R. Co., 76 Va. 284.

[7] Drew *v.* Swift, 46 N. Y. 204, and cases cited. Thus oral evidence, that the word "degree" should be read "perches," is not admissible. Clarke *v.* Lancaster, 36 Md. 196, s. c., 11 Am. Rep. 486.

Parol evidence is admissible to explain a latent ambiguity and to identify the subject matter of the conveyance. But in order to show a mistake or error, for instance in the description, the intercession of a court of equity is necessary. Munn *v.* McWhite, 80 S. C. 472, 61 S. E. Rep. 970; Donehoo *v.* Johnson, 120 Ala. 438, 24 So. Rep. 888; Leverett *v.* Bullard, 121 Ga. 534, 49 S. E. Rep. 591.

In the case of a patent ambiguity, parol evidence is inadmissible. Thus, a deed, describing the premises merely by the words: "North of Castor River" is void because of patent ambiguity, it not appearing that the property was known in the community by that general description, and it cannot be aided by parol. Martin *v.* Kitchen, 195 Mo. 477, 93 S. W. Rep. 780.

Similarly, a deed describing the land as "3.05 acres in unplotted lands of Gurdon, situated on the east side of southwest quarter of section 28, township 9 south, range 20 west" has been held a nullity for patent ambiguity. Cooper *v.* Newton, 68 Ark. 150, 56 S. W. Rep. 867.

[8] See paragraph 8; Parks *v.* Moore, 13 Vt. 183; and compare Doe d. Freeland *v.* Burt, 1 T. R. 701, with Doe d. Norton *v.* Webster, 12 A. & E. 442, 450. Where, by proof *aliunde* the deed, it is shown that no property answering the description belongs to the grantor at the place indicated, but

cate[9] and apply the description.[10] When the description in a deed designates a particular piece of land, the description cannot be departed from by a parol evidence of intent, and declarations of the grantor are inadmissible to show that something else was intended to be conveyed.[11] The

other lands in the vicinity, corresponding in some particulars to such description, did belong to him, a latent ambiguity is created which may be solved by the further indications afforded by the deed or by extraneous evidence. Thayer *v.* Finton, 108 N. Y. 394, 399, 15 N. E. Rep. 615. Where it is doubtful to which of two tracts of land in the same neighborhood, both the property of the execution debtor, the description in a marshal's deed applies, extrinsic evidence may be admitted to show which was intended. Cox *v.* Hart, 145 U. S. 376. The evidence need not be of the same high character and tendency as that which would be required to authorize the correction of a mistake in the deed. Houston *v.* Bryan, 78 Ga. 181, 6 Am. St. Rep. 252, 1 S. E. Rep. 252.

In Perrior *v.* Peck, 39 App. Div. 390, 57 N. Y. Supp. 377, the defendant was allowed to show by parol that a deed conveying one half of a partition wall "and also all the dower, right and interest of the party of the first part as widow of the late Samuel Larned, deceased, (said widow being a third person long deceased) of, in, and to the following described premises, viz," then reciting the correct description of the lands intended to be conveyed, did not embody the true intent of the parties and testimony *aliunde* in explanation of such intent was held competent and reform might be allowed, although unnecessary.

[9] McNitt *v.* Turner, 16 Wall. 352, 364. The deed is not admissible if the description of premises is incapable of affording the clue to their identification, but if there be a reference to extrinsic documents or acts for the identification, the deed is admissible, subject to the subsequent production of the necessary evidence (Deery *v.* Cray, 10 Wall. 263); and the production of the documents or evidence of the acts referred to in the deed is not always essential, but an actual boundary long acquiesced in, the deed being ancient, may be enough. Id.

[10] Blake *v.* Doherty, 5 Wheat. 359. Where a deed describes the land conveyed thereby as being "parts" of certain lots, but not stating what parts, parol testimony is admissible to show that the land covered by the deed was the same as that in controversy. Shore *v.* Miller, 80 Ga. 93, 12 Am. St. Rep. 239, 4 S. E. Rep. 561; Light *v.* Miller, 38 Pa. Sup. Ct. 408 and cases cited.

[11] Light *v.* Miller, 38 Pa. Super. Ct. 408; Armstrong *v.* Dubois, 90 N. Y. 95, 104; Tymason *v.* Bates, 14 Wend. 675; Cornell *v.*

long continued and uniform acts of the parties, in case of ambiguity (but not otherwise)[12] may show that a deed was intended as a conveyance,[13] and the boundaries intended.[14] Within these limits, the rule excluding oral evidence, applies alike to prior contemporaneous and subsequent declarations.

Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are primary evidence of facts of general notoriety and interest; but they weigh only as hearsay, against testimony of witnesses to facts within their memory.[15] Maps

Todd, 2 Denio, 130; Clark *v.* Baird, 9 N. Y. 183; Drew *v.* Swift, 46 N. Y. 204; Griffin *v.* Hall, 115 Ala. 482, 22 So. Rep. 162. Nothing passes by a deed except what is described in it, whatever the intention of the parties may have been, but when words of general description are used, oral evidence is admissible to ascertain the particular subject-matter to which they apply, without infringing upon the rule which prohibits parol evidence to add or contradict the language of written instruments. The object of oral evidence in such cases is to ascertain the intention of the parties as expressed in the writing, and not to make the deed operate upon land not embraced in the descriptive words. Coleman *v.* Manhattan Beach Imp. Co., 94 N. Y. 229, 232; Doe *v.* Holton, 4 Ad. & El. 76; Sanford *v.* Raikes, 1 Mer. 646, 653.

A mistake in including in a deed more land than was intended cannot be shown by parol. King *v.* Thompson, 58 W. Va. 455, 52 S. E. Rep. 487.

[12] Unless for a length of time sufficient to give title by adverse possession, or unless there is an estoppel. Emerick *v.* Kohler, 29 Barb. 165. Title cannot be divested by estoppel *in pais*. Babcock *v.* Utter, 1 Abb. Ct. App. Dec. 27. Whether an estoppel arises from matter of description, doubted; it does not from uncertain matter. Edmonston *v.* Edmonston, 13 Hun, 133, 136.

[13] Steinback *v.* Stewart, 11 Wall. 566, 576.

[14] Cavazos *v.* Trevino, 6 Wall. 773; Harris *v.* Oakley, 130 N. Y. 1, 28 N. E. Rep. 530; Clark *v.* Wethey, 19 Wend. 320; Vosburgh *v.* Teator, 32 N. Y. 561; Wood *v.* Lafayette, 46 N. Y. 484; Stout *v.* Woodward, 5 Hun, 340, affi'd 71 N. Y. 590; Donahue *v.* Case, 61 N. Y. 631.

[15] Missouri *v.* Kentucky, 11 Wall. 395, 410. A local history is not competent evidence upon the question as to the date when possession and occupancy of land by a private individual began. Roe *v.* Strong, 107 N. Y. 350, 14 N. E. Rep. 294.

Extracts from land books, showing that a tract of land, containing the same number of acres and being

and diagrams necessary or useful for the understanding of testimony may be put in evidence on proof of their correctness, although prepared for the purpose of the trial.[16]

11. — Boundaries.

A variance in the boundaries proved from those alleged, if it has not misled, should be cured by amendment.[17] The rule that fixed and known monuments and boundaries control other designations, is only a natural presumption ordinarily arising from the terms of the whole description.[18]

in the same direction as the land in controversy, was charged to plaintiffs for purposes of taxation, have been held admissible for the purpose of showing that plaintiffs had made claim to the land and paid taxes thereon. Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 25 S. E. Rep. 232.

[16] Curtiss *v.* Ayrault, 3 Hun, 487, 490, and cases cited.

[17] Russell *v.* Conn, 20 N. Y. 81. Where the land in dispute was only a small part of the piece described in the declaration it is proper to allow an amendment describing particularly the piece in dispute. Hartz *v.* Detroit, etc., R. Co., 153 Mich. 337, 116 N. W. Rep. 1084.

[18] Baldwin *v.* Brown, 16 N. Y. 359, 361. See also chapter XXX, paragraphs 34, 38 and chapter XLIX, paragraph 2 of this vol. Definite monuments, referred to in a deed, control the location of the land conveyed. Bartlett *v.* La Rochelle (N. H.), 44 Atl. Rep. 303. In Pennsylvania, original marks and living monuments are the highest proof of the location of a survey; the calls of adjoining surveys are the next most important evidence of it; and it is only in the absence of both that corners and distances returned by the surveyor to the land office determine it. Clement *v.* Packer, 125 U. S. 309. Calls in a survey for natural objects or marked lines and corners prevail over calls for course and distance. Johnson *v.* Archibald, 78 Tex. 96, 22 Am. St. Rep. 27, 14 S. W. Rep. 266. When the quantity is mentioned in addition to a description of the boundaries, or other certain designation of the land, without an express covenant that it contains that quantity, the whole is considered as mere description. The quantity being the least certain part of the description must yield to the boundaries or number of lot if they do not agree. Thayer *v.* Finton, 108 N. Y. 394, 398, 15 N. E. Rep. 615; Jackson *v.* Moore, 6 Cow. 706.

Where the boundary of land is running water, any accretion from the water belongs to the riparian owner and the stream is still the boundary. McBride *v.* Stein-

Official surveys, properly authenticated,[19] are *prima facie* evidence of their own correctness.[20] Evidence of the surveyor's declarations, contradicting his official return, are not evidence while he is living.[21] The notes of the official surveyor are competent evidence as to those objects which, in the discharge of his duty, he ought to have ascertained—such as the lines and monuments—and received as a part of the *res gestæ;* but not of anything else—for instance, possession.[22] Declarations of a surveyor employed to run a boundary, if made in connection with his work, and in reference to it, are admissible in evidence after his death, against the party who employed him.[23] A surveyor, as an expert may testify to his opinion as to matters of fact requiring special knowledge,[24] but not as to the construction

weden, 72 Kan. 508, 83 Pac. Rep. 822.

[19] People *v.* Denison, 17 Wend. 312. The maps, plats, and deeds of land referring to a specified road, all traces of which have disappeared, are the best evidence to establish its location. Hoffman *v.* City of Port Huron, 110 Mich. 616, 68 N. W. Rep. 546.

Testimony as to a city map and the numbering of lots in deeds to city property as conforming to the numbers of an old map, was held relevant and proper as throwing light on the relative location of the lots. Lacroix *v.* Malone, 157 Ala. 434, 47 So. Rep. 725.

[20] Cofield *v.* McClelland, 16 Wall. 331; and, after the lapse of twenty-one years, there arises a conclusive presumption of law that such survey was regularly made and marked upon the land as returned. Ormsby *v.* Ihmsen, 34 Penn. St. 462; Carroll *v.* Price, 81 Fed. Rep. 137.

[21] Barclay *v.* Howell's Lessee, 6 Pet. 498; compare Birmingham *v.* Anderson, 70 Penn. St. 506.

[22] Ellicott *v.* Pearl, 1 McLean, 206, affi'd in 10 Pet. 412. Compare Ormsby *v.* Ihmsen, (above). The rules as to memoranda, refreshing memory, have been already stated. Chapter XVI; Olin *v.* Henderson, 120 Mich. 149, 79 N. W. Rep. 178; Sommer *v.* Compton, 52 Or. 173, 96 Pac. Rep. 124, 1065.

[23] McCormick *v.* Barnum, 10 Wend. 104; Barclay *v.* Howell's Lessee (above). The declaration of the surveyor who made the survey is competent evidence to show that the mistake therein is in the call for a natural object, and not in the call for course and distance. Johnson *v.* Archibald, 78 Tex. 96, 22 Am. St. Rep. 27, 14 S. W. Rep. 266.

[24] For instance as to whether certain marks on trees and piles of stones, were intended as monuments of boundaries. Davis *v.* Mason, 4 Pick. 156. Compare

or effect of the deed.[25] Practical acquiescence (by the owners [26] who are separated by the boundary in question) in the location of a boundary for more than twenty years,[27] is conclusive; but acquiescence for a few years is not enough,[28] unless on the ground of estoppel.[29] The declarations of

Barron *v.* Cobleigh, 11 N. H. 557.

A surveyor, who had surveyed the lands described in defendant's deed and made a map thereof, which had been read in evidence was allowed to testify that the "deed did not include or describe the land sued for in this action." Donehoo *v.* Johnson, 120 Ala. 438, 24 So. Rep. 888. See Ronk *v.* Higginbotham, 54 W. Va. 137, 46 S. E. Rep. 128.

[25] For instance, whether certain land is included in a written description. Lanier *v.* Orr, 110 Ga. 267, 34 S. E. Rep. 306; Woodburn *v.* Farmers, &c. Bank, 5 Watts & S. 447; Schultz *v.* Lindell, 30 Mo. 310, 321. One who has examined surveys and maps including the premises, and plotted the same out according to the surveys, and followed, with his eye, the different lines as given in the deed under which a party claims, may be allowed to testify as to the location of the party's occupancy. Van Rensselaer *v.* Vickery, 3 Lans. 57. It is competent to prove by a surveyor, that the courses and distances in a deed are incongruous, and that all the lines differ in length from the deed. Ratcliffe *v.* Cary, 4 Abb. Ct. App. Dec. 4.

[26] Terry *v.* Chandler, 16 N. Y. 354, 357.

[27] Baldwin *v.* Brown, 16 N. Y. 359; McCormick *v.* Barnum, 10 Wend. 104, 109; Jones *v.* Smith, 64 N. Y. 180. A universal rule. Tyl. Ej. 575.

A boundary line may be established by estoppel without agreement where the parties have had undisturbed possession in conformity thereto for more than 20 years. Clayton *v.* Feig, 179 Ill. 534, 54 N. E. Rep. 149; Keller *v.* Harrison, 139 Iowa, 383, 116 N. W. Rep. 327.

Evidence that a claimant pastured horses on unenclosed land, set out trees, erected a small house, dug a well, mowed the land or leased it to others for more than 20 years was held sufficient to establish possession under a claim of title. Sullivan *v.* Eddy, 164 Ill. 391, 45 N. E. Rep. 837.

[28] Id., Reed *v.* McCourt, 41 N. Y. 435.

[29] Smith *v.* McNamara, 4 Lans. 169; and see Vosburgh *v.* Teator, 32 N. Y. 561, 568. An oral agreement and short possession are not alone enough to change boundary, nor can an acquiescence for twenty years be disregarded on evidence that it was suffered under mistake (Baldwin *v.* Brown, above); or intended as temporary. Pierson *v.* Mosher, 30 Barb. 81. "Where there is a dispute between adjoining owners of land as to the true

ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial, are admissible; where nothing appears to show that they were interested to misrepresent in thus pointing out their boundaries, and it need not appear affirmatively that the declarations were made in restriction of, or against, their own rights.[30] To identify a monument represented on a plat or survey as marking a corner, it is not competent to prove reputation of the neighborhood as to it, at the present day, unless such

boundary line or that line is unascertained, they may establish it, first by parol agreement and possession in pursuance thereof, and the line so agreed upon will be binding upon them and their privities in estate; second, such an agreement may be implied from the unequivocal facts and declarations of the parties and acquiescence for a considerable length of time; third, such an agreement either express or implied, is enforceable both at law and in equity whether the period of limitation has run or not; fourth, the line may be established by way of estoppel without any agreement, when the parties have had undisturbed possession in conformity thereto for more than twenty years." Clayton *v.* Feig, 179 Ill. 534, 54 N. E. Rep. 149. On the question of practical location it is competent to ask a witness whose residence and relation to the parties has been such that had there been difference between the adjoining proprietors in respect to the line, he would have been likely to know it, whether he ever heard of more than one line; and his answer, that he had not, is some evidence of acquiescence in that line. Ratcliffe *v.* Cary, 4 Abb. Ct. App. Dec. 4.

[30] Daggett *v.* Shaw, 5 Metc. (Mass.) 223, 226. Compare Wendell *v.* Abbott, 45 N. H. 349; Bartlett *v.* Emerson, 7 Gray (Mass.), 174; Metcalf *v.* Buck, 36 Pa. Super. Ct. 58. Declarations of a former owner of land, now dead, are admissible to show the identity of a particular corner tree or other corner or marked boundary line; but not a mere general statement or claim that certain land was in his boundary, or where the lines would run, or that he owned the land, without reference to any corners or marked lines. If it appears that such declarations are open to suspicion of bias from interest, they cannot be received or made *post litem motam*. High's Heirs *v.* Pancake, 42 W. Va. 602, 26 S. E. Rep. 536. As to declarations against interest, see Neal *v.* Hopkins, 87 Md. 19, 39 Atl. Rep. 322.

reputation was traditionary in its character; having passed down from those who were acquainted with the reputation of the mark from an early day to the present time, or unless the information as to such reputation was derived from ancient sources or from persons who had peculiar means of knowing what the reputation of the mark was at an early day. But it is competent to prove that the occupants of the tracts adjoining the corner each claimed the mark as the true corner of their tracts.[31] Hearsay evidence, if pertinent and material to the issue between the parties, should be received to establish ancient boundaries.[32] But it is necessary to show, preliminary to the introduction of hearsay testimony, that the person, whose statement it is proposed to prove, is dead, because if alive he must be produced.[33]

12. — Title Under Judicial or Statutory Authority.

A deed made pursuant to the requirement of a judicial decree [34] or order [35] if it be made by the person in whom

[31] Shutte *v.* Thompson, 15 Wall. 151.

Where there is a discrepancy between the monuments and the courses and distances called for in the deed, the monuments will control. If the monuments are gone, their location can be shown by parol proof and they will still control. Metcalf *v.* Buck, 36 Pa. Super. Ct. 58.

Where there is no fixed and official establishment by monument of a corner, a witness may testify to all surrounding facts and circumstances tending to determine the location of the corner. Lecroix *v.* Malone, 157 Ala. 434, 47 So. Rep. 725.

[32] Taylor *v.* Fomby, 116 Ala. 621, 22 So. Rep. 910.

Pointing out to witness the line of boundaries. Metcalf *v.* Buck, 36 Pa. Super. Ct. 58.

[33] Shaffer *v.* Gaynor, 117 N. C. 15, 23 S. E. Rep. 154. When the question relates to the precise position of a building, a witness cannot be allowed to testify as to what the owner of the building said to him about its position, such evidence being hearsay. Tome Institute *v.* Davis, 87 Md. 591, 41 Atl. Rep. 166.

[34] Games *v.* Dunn, 14 Pet. 332, affi'g 1 McLean, 321.

Parol evidence is not admissible to show that the decree under which the plaintiff's grantor claimed was void. Wilcher *v.* Robertson, 78 Va. 602.

[35] Hanrick *v.* Neely, 10 Wall. 364, 366. *Contra*, Platt *v.* Picton, 3 Robt. 64.

title was vested,[36] may be given in evidence (against a stranger,[37] equally as against a party) without producing the decree or order,[38] though it be recited in the deed.[39] But

But the admission in evidence of a deed of land sold by order of the ordinary, which made no reference to the order of sale, was held error. Sapp *v.* Cline, 131 Ga. 433, 62 S. E. Rep. 529.

In order to give in evidence a conveyance of a special commissioner under the decree of a court it should be accompanied by the whole record of the cause or "enough to show that the party holding the title to the land, and the land, were before the court; that that land was decreed to be sold, and was sold, and the sale confirmed and authority given by decree to the commissioner to convey. That commissioner does not own the land. He has a mere naked authority uncoupled with any personal interest. His authority to make the very deed for the very land he conveys must appear by the record." Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. Rep. 367.

[36] As for instance by the debtor himself (Rockwell *v.* Brown, 54 N. Y. 210, rev'g 33 N. Y. Super. Ct. (1 J. & S.) 380, s. c., 11 Abb. Pr. N. S. 400, 42 How. Pr. 226), or by an assignee or receiver to whom the debtor is shown to have conveyed. Compare Dawley *v.* Brown, 65 Barb. 107; The Chautauqua Co. Bank *v.* White, 6 N. Y. 236; Same *v.* Risley, 19 N. Y. 369; Van Wyck *v.* Baker, 10 Hun, 39; Cole *v.* Tyler, 65 N. Y. 73. If the debtor's title was vested in the receiver by law without assignment, the decree effecting this should be produced. See Koontz *v.* Northern Bank, 16 Wall. 196.

Where a deed is executed by the Mayor by order of the city council, and the grantee paid the agreed consideration, the latter cannot after holding possession of the property for many years, be disseized by the city on the ground that the Mayor was not the proper person to execute the conveyance, especially as the grantee had equitable rights over the property antedating the deed from the city. Morgan *v.* Johnson, 106 Fed. Rep. 452, 45 C. C. A. 421.

[37] Barr *v.* Gratz, 4 Wheat. 213; Gregg *v.* Forsyth, 24 How. U. S. 179.

A judgment of partition is admissible as a link in plaintiff's chain of title, although defendant is a stranger to the record. Greenleaf *v.* Brooklyn, etc., R. R. Co., 132 N. Y. 408, 30 N. E. Rep. 762.

[38] Except when the statute forbids sale unless such order is made. Gallatian *v.* Cunningham, 8 Cow. 361.

[39] Games *v.* Dunn, 14 Pet. 322.

But see Wilson *v.* Braden, 48 W. Va. 196, 36 S. E. Rep. 367 holding that the recital in a commissioner's deed of his authority under a decree is no evidence against third parties claiming adversely

the decree or order may be put in evidence, either to support the deed,[40] or to show that it was unauthorized,[41] or to qualify its apparent effect,[42] or to show that the proceeding was without jurisdiction.[43] The purchaser is presumed to have known the legal effect of the decree.[44] If jurisdiction appears, errors or mistakes cannot be shown, to impeach the title, in a collateral proceeding.[45] If the want of jurisdiction appears, or if the statute expressly makes the sale void for an irregularity, the title will not avail in ejectment,[46] except as against the party who obtained it and effected the sale under

to it, and denying his authority to convey.

[40] Fuller *v.* Van Geeson, 4 Hill, 171, affi'd in How. App. Cas. 240; Dirst *v.* Morris, 14 Wall. 484, 490.

And in case of decree in foreclosure the mortgage need not be produced (Sinclair *v.* Jackson, 8 Cow. 543), and cannot be impeached (Jackson *v.* Jackson, 5 Cow. 173), except on grounds adequate to impeach the judgment itself (Mandeville *v.* Reynolds, 68 N. Y. 528, 542, affi'g 5 Hun, 338).

For instance, to show that a decree in an action of foreclosure commenced after the death of the mortgagor was not effective to authorize a foreclosure sale. Lewis *v.* Hamilton, 58 Pac. Rep. 196, 26 Colo. 263. See also Stone *v.* Perkins, 85 Fed. Rep. 616.

[41] See Gray *v.* Brignardello, 1 Wall. 627.

[42] Bigelow *v.* Forrest, 9 Wall. 339, 351.

Where leased premises are sold by decree of the court free of the alleged lease, the lessee, being a party to the action, was bound by the decree and could not, with the decree unreversed, set up his lease as a defense in an action of ejectment by the vendee. Union Brewing Co. *v.* Meier, 163 Ill. 424, 45 N. E. Rep. 264.

[43] Rockwell *v.* McGovern, 69 N. Y. 294, affi'g 40 Super. Ct. (J. & S.) 118.

[44] Bigelow *v.* Forrest (above).

On that theory a commissioner's deed conveying more land than a decree of the court authorized, is valid only to the extent of the land authorized by such decree. Moss *v.* Scott, 2 Dana (Ky.), 271.

[45] Rorer on Jud. S. 202, § 480, 203, § 482.

Thus irregularities in condemnation proceedings, which were not corrected by appeal, cannot be set up in an action in ejectment, it appearing that the court which heard those proceedings had jurisdiction not only of the subject matter but also of the parties. Tuller *v.* Detroit, 97 Mich. 597, 56 N. W. Rep. 1032.

[46] Id. 204, § 485; and see Gregg *v.* Forsyth, 24 How. U. S. 180; Secrist *v.* Green, 3 Wall. 744, 751.

it, and those claiming under his title,[47] or as color of title under which adverse possession is shown; but a decree is admissible even against one not served, if it may be a link in plaintiff's title, in connection with other evidence.[48] To show title by foreclosure, by advertisement under the statute,[49] regular foreclosure must be shown.[50] The evidence which the statute declares to be equivalent to a deed, cannot be added to, varied, or contradicted by parol by a person claiming under it;[51] but any other person may thus controvert it.[52] The affidavits of publication, posting, and affixing in county clerk's book's, being only *prima facie* evidence of the acts declared to stand as the conveyance, defects therein may be supplied by parol.[53]

In the case of *special statutory proceedings* the record is the primary evidence,[54] and is *prima facie*, but not

[47] Brobst *v.* Brock, 10 Wall, 519, 533, and cases cited.

[48] Dirst *v.* Morris, 14 Wall. 484, 490. For the mode of proving the decree see Chapter XXIX.

[49] N. Y. Code Civ. Proc., § 2387 *et seq.*

[50] Layman *v.* Whiting, 20 Barb. 559; C. W. Zimmerman Mfg. Co. *v.* Pugh (Ala.), 39 So. Rep. 989.

[51] Mowry *v.* Sanborn, 68 N. Y. 153, rev'g 7 Hun, 380. Otherwise before the statute had this effect. Hawley *v.* Bennett, 5 Paige, 104.

Parol evidence is admissible to explain an ambiguity in a deed, and as thus explained the deed is admissible as a muniment of title upon which the plaintiff can recover in an action of ejectment. Leverett *v.* Bullard, 121 Ga. 534, 49 S. E. Rep. 591.

[52] Sherman *v.* Willett, 42 N. Y. 946, 149.

[53] Mowry *v.* Sanborn, 72 N. Y. 534; and see Mann *v.* Best, 62 Mo. 491. As to delay in making and recording the affidavit, compare Tuthill *v.* Tracy, 31 N. Y. 157; Frink *v.* Thompson, 4 Lans. 489; Chapman *v.* Delaware, &c. R. R. Co., 3 Lans. 261.

[54] See Jackson *v.* Daley, 5 Wend. 526. The book of a school commissioner (since deceased) preserved in the county archives, and containing a record of his proceedings in selling lands reserved for school purposes, and a list of such lands made by one (since deceased) acting under his direction, is competent, both as a public record and as entries of a deceased person in course of official duty, to prove what lands were reserved for school purposes, and therefore could be conveyed by the state. Hedrick *v.* Hughes, 15 Wall. 123, 127. The secondary evidence of the contents of a record need not be a strict copy. A memorandum

conclusive, evidence of the jurisdictional facts recited in it.[55]

13. — on Execution Sale.[56]

Title is to be proved by the sheriff's certificate and deed,[57] the judgment or decree,[58] or a duly authenticated copy,[59] or, in case of a justice's judgment docketed, the transcript with proof of its entry,[60] and the execution.[61] Contents of a lost execution may be proved by secondary evidence,—and for this purpose the deceased attorney's register is competent, after issue to the sheriff has been shown.[62] These documents

or selection of extracts, if embodying correctly what is material, is competent, especially where it was contemporaneous with the record. Id.

[55] Adams *v.* Saratoga & Washington R. R. Co., 10 N. Y. 328, rev'g 11 Barb. 414. As to the presumptions indulged in support of the record in other respects, see Denning *v.* Smith, 3 Johns. Ch. 332; Wood *v.* Chapin, 13 N. Y. 509; Cleveland *v.* Boerum, 27 Barb. 252, affi'g 23 Id. 201, 3 Abb. Pr. 294, and chapter XXIX, paragraphs 22, etc., of this vol.; Bursey *v.* Lyon, 30 App. Cas. D. C. 597.

[56] These rules are much varied by the statutes in some of the states.

[57] Clute *v.* Emmerick, 12 Hun, 504. Recitals in the deed to an assignee of the certificate are sufficient evidence of the assignment. Rorer Jud. S. 402, § 1077.

A sheriff's certificate of sale is sufficient evidence of title to support an action of ejectment. Hockett *v.* Alston, 3 Ind. T. 432, 58 S. W. Rep. 675.

[58] Wilson *v.* Conine, 2 Johns. 280; Ins. Co. *v.* Halleck, 6 Wall. 556.

Plaintiff, to recover, must show a valid judgment, execution, levy, and sale and that the defendant in judgment, to whose title plaintiff claims to have succeeded had an estate or interest in the land which was subject to execution. Carter *v.* Smith, 142 Ala. 414, 38 So. Rep. 184, 110 Am. St. Rep. 36.

[59] Jackson *v.* Hasbrouck, 12 Johns. 213; Townshend *v.* Wesson, 4 Duer, 342. See chapter XXIX, paragraph 1 of this vol.

[60] WALWORTH, Ch., Tuttle *v.* Jackson, 6 Wend. 213, 222; Arnold *v.* Gorr, 1 Rawle, 223; Dickinson *v.* Smith, 25 Barb. 102. See N. Y. Code Civ. Pro., § 938.

[61] Labattie *v.* Baggs, 55 Ga. 572. Lack of seal (Ins. Co. *v.* Halleck, 6 Wall. 556, 558) may be cured by amendment. McGoon *v.* Scales, 9 Wall. 23, 31.

The execution should show upon what judgment it was issued. Anderson *v.* Gray, 134 Ill. 550, 25 N. E. Rep. 843, 23 Am. St. Rep. 696.

[62] Leland *v.* Cameron, 31 N. Y. 115.

are *prima facie* sufficient as against the debtor, if he is also shown to have been in possession.[63] But as against others in possession, plaintiff must show that some title or interest was in the judgment debtor.[64] Authority of a general deputy to execute a deed in the sheriff's name is presumed.[65] A sheriff's deed is supported by a presumption that the officer performed his duty,[66] and that the acts recited, though stated very generally, were done in a manner conformable to the statute;[67] and the granting part is not to be varied,[68] except by evidence legitimate by way of explanation, or making a case for equitable reformation.[69] The sheriff's certificate of sale, or a certified copy, is by the statute[70] presumptive evi-

The fact that one of the writs of execution cannot be found is immaterial, where it appears that the sheriff's deed was executed sixty years prior to the date of the action and the record shows that the writ had been issued. Riffert *v.* Lehigh Valley Coal Co., 232 Pa. 629, 81 Atl. Rep. 810. See also N. Y. Code Civ. Pro., § 961e.

[63] Kellogg *v.* Kellogg, 6 Barb. 116; Tuttle *v.* Jackson, 6 Wend. 213, 223. And in some cases conclusive, Dickinson *v.* Smith, 25 Barb. 102, and cases cited.

Production of the judgment, process and the sheriff's deed, establishes a *prima facie* case against the defendant in the judgment, who is in possession. The latter cannot defeat plaintiff's case by showing a parol sale of the land which would be against the statute of frauds. Kirkbeck *v.* Kelly, 6 Pa. Cas. 343, 9 Atl. Rep. 313.

[64] Tyl. Ej. 177, 530.

[65] Jackson *v.* Davis, 18 Johns. 7.

[66] Wood *v.* Morehouse, 45 N. Y. 368, affi'g 1 Lans. 405; Jackson *v.* Shaffer, 11 Johns. 513.

[67] Leland *v.* Cameron, 31 N. Y. 115; McGoon *v.* Scales, 9 Wall. 23, 30. Compare, to the contrary, Walker *v.* Moore, 2 Dill. C. Ct. 256.

A sheriff's deed, which is duly acknowledged and proved, is *prima facie* evidence of the truth of the recitals it contains but defendants in possession may under a general denial attack the truth of such recitals. Meyers *v.* Conover, 65 N. J. Law 187, 46 Atl. Rep. 709.

[68] Jackson *v.* Roberts, 11 Wend. 422. As to the recitals, compare Phillips *v.* Shiffer, 14 Abb. Pr. N. S. 101.

[69] Bartlett *v.* Judd, 21 N. Y. 200, affi'g 23 Barb. 262.

[70] N. Y. Code Civ. Proc., § 1471.

To rebut this presumption of regularity the party assailing the sheriff's deed may produce the whole record in the case and show that the judgment was invalid and the deed based thereon void. Cum-

dence of the facts required to be stated therein,[71] and plaintiff should be prepared to prove such a certificate.[72] Return of the execution sale is not necessary unless made so by statute.[73]

The deed may be defeated by oral evidence that the judgment had been paid;[74] but the declarations of the sheriff, though he be deceased, are not competent for this purpose,[75] unless part of the *res gestæ*. A certificate of redemption duly made is *prima facie* evidence.[76]

14. — on Surrogate's Sale.

By statute in New York,[77] as well as by the weight of opinion in modern decisions, independent of such special statutes, if jurisdiction appear (and this is, *prima facie*, shown by recitals in the record according to principles already stated),[78] the burden now lies on the party claiming in opposition to a sale under a surrogate's order, to show a defect in the proceedings, such as would impeach the judgment of a court of general jurisdiction. The lapse of sufficient time (twenty or

mings *v.* Brown, 181 Mo. 711, 81 S. W. Rep. 158.

[71] Anderson *v.* James, 4 Robt. 35; Cummings *v.* Brown, 181 Mo. 711, 81 S. W. Rep. 158; Wainwright *v.* Bobbitt, 127 N. C. 274, 37 S. E. Rep. 336.

[72] Clute *v.* Emmerick, 12 Hun, 504. *Contra*, Tyl. Ej. 529.

[73] Wheaton *v.* Sexton, 4 Wheat. 503. Compare Willcox *v.* Emerson, 10 R. I. 270, s. c., 14 Am. Rep. 683.

[74] Jackson *v.* Cadwell, 1 Cow. 622; Stafford *v.* Williams, 12 Barb. 240.

[75] Woodgate *v.* Fleet, 11 Abb. Pr. N. S. 41, s. c., 44 N. Y. 1.

[76] People ex rel. Chase *v.* Rathbun, 15 N. Y. 528, affi'g Griffin *v.* Chase, 23 Barb. 278; and see Livingston *v.* Arnous, 56 N. Y. 507, affi'g 15 Abb. Pr. N. S. 158; Rice *v.* Davis, 7 Lans. 193.

[77] N. Y. Code Civ. Pro., §§ 2513, 2716; Forbes *v.* Halsey, 26 N. Y. 53.

[78] Chapter XXIX, paragraph 22, &c., of this vol. Comstock *v.* Crawford, 3 Wall. 396. A petition conforming to the statute is sufficient (Florentine *v.* Barton, 2 Wall. 210, 216), with proof of publication, where publication is required (McNitt *v.* Turner, 16 Wall. 352, 365). Where the statute does not require notice, the record need not show that notice was given (Florentine *v.* Barton, [above]). Neither the evidence nor the finding of necessary facts need appear, if the statute does not require it.

thirty years) raises a conclusive presumption that the proceedings to sustain the order for sale and the deed, were regular.[79]

15. — on Tax Sale.

Unless otherwise provided by statute, the claimant must prove strictly every substantial requisite to a valid tax and sale under it.[80] He must show affirmatively step by step that everything has been done which the statute made essential;[81] unless he had actual possession, and is suing a mere trespasser,[82] or is relying on the title only as a claim characterizing his adverse possession.[83] The recitals in a tax deed are not, against the owner, even *prima facie* evidence.[84]

Cornett *v.* Williams, 20 Id. 226, 250.

[79] 1 Greenl. Ev., 13th ed. 26, § 20; Florentine *v.* Barton (above). But see Sapp *v.* Cline, 131 Ga. 433, 62 S. E. Rep. 529.

[80] Williams *v.* Peyton, 4 Wheat. 77; Little *v.* Herndon, 10 Wall. 26, 31. When the plaintiff does not set out the source of the title, but on the trial relies on a tax title, it is competent for defendant to introduce in evidence any fact which might show or tend to show that plaintiff had no right of entry when the suit was brought, and which might tend to defeat the title of the plaintiff, or show a want of consideration for the deed under which plaintiff claims title and right of entry. Eastman *v.* Gurrey, 15 Utah, 410, 49 Pac. Rep. 310; Warren *v.* Williford, 148 N. C. 474, 62 S. E. Rep. 697; Norris *v.* Hall, 124 Mich. 170, 82 N. W. Rep. 832. Rule changed by statute in that state since. Anderson *v.* Besser, 131 Mich. 481, 91 N. W. Rep. 737; Boyd *v.* Miller, 22 Tex. Civ. App. 165, 54 S. W. Rep. 411.

"A void tax deed purporting to evidence the sale of land as the property of an owner named may be used to show the claim of title by a defendant when sued by some one claiming from the same source." See also Burns *v.* Goff, 79 Tex. 236, 14 S. E. Rep. 1009.

[81] Blackw. 75.

Prima facie proof of title in the plaintiff is not overcome by a tax deed where it was not shown that the proceedings, preceding the execution of the tax deed, had been had in strict compliance with the statute. Glanz *v.* Ziabek, 233 Ill. 22, 84 N. E. Rep. 36.

[82] Thompson *v.* Burhans, 61 N. Y. 59, rev'g 61 Barb. 260.

[83] Id.; Pillow *v.* Roberts, 13 How. U. S. 472.

[84] Blackw. 73; Tyl. Ej. 536.

It was held in Burden *v.* Taylor, 124 Mo. 12, 27 S. W. Rep. 349 that a tax deed which did not contain recitals showing that all

Lapse of time, however, excuses inability to produce full evidence of minute details;[85] but a presumption of regularity cannot serve in lieu of producing the record if it can be produced, nor serve to show that there was a proper record where it appears that none can be found.[86] The official assessment made and kept pursuant to law is admissible, on production, with evidence that it comes from the proper official custody, and the oath of the maker or custodian is not necessary.[87] The final assessment roll is equally competent.[88] If the designation of land is sufficient under the statute the testimony of the assessor is competent to identify the property.[89] If the statute[90] makes the deed *prima facie* evidence, it merely shifts the burden of proof;[91] and whether

the statutory requirements had been complied with was void on its face and extrinsic evidence offered to supply such defects was inadmissible.

[85] Stead *v.* Course, 4 Cranch, 403; Hilton *v.* Bender, 69 N. Y. 75, 82.

[86] Blackw. 533; Hilton *v.* Bender (above).

[87] Whart. Ev., § 639. Or a certified copy. Wing *v.* Hall, 47 Vt. 182. The production of what purport to be assessment rolls, without proof of their authenticity or the genuineness of the assessors' signatures, is not sufficient evidence that the taxes therein mentioned were duly imposed. Stevens *v.* Palmer, 10 Bosw. 60.

An immaterial departure from the requirements of the statute in making, delivering and passing upon an assessment does not constitute such an omission as would render the action of the assessors void as being without authority of law. Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. Rep. 411.

[88] Ronkendorf *v.* Taylor's Lessee, 4 Pet. 349.

[89] Russell *v.* Werntz, 24 Penn. St. 337, 346.

Where a sheriff's deed, executed in a proceeding to foreclose a tax lien, contained an accurate but general description, evidence *aliunde* is admissible to locate the lands conveyed. Abbott *v.* Coates, 62 Neb. 247, 86 N. W. Rep. 1058.

[90] The statutory presumption may depend on the statute in force at the time of the trial. Hickox *v.* Tallman, 38 Barb. 608; Cracraft *v.* Meyer, 76 Ark. 450, 88 S. W. Rep. 1027; May *v.* Dobbins, 166 Ind. 331, 77 N. E. Rep. 353.

[91] Williams *v.* Kirtland, 13 Wall. 306; Johnson *v.* Elwood, 53 N. Y. 431, modified on another point, in 56 Id. 614.

A deed given by land commissioners is *prima facie* evidence of title. This presumption may be overcome as by showing that the acquisition of the land by the city in tax proceedings was never con-

it declare the deed to be *prima facie* or conclusive [92] evidence, the courts do not give this effect any further than expressly required, and will not extend the presumption to previous [93] or subsequent [94] proceedings. If the statute does not declare that the deed shall be *prima facie* evidence, the burden is on one claiming under the deed to prove compliance with the law; and the general presumption of official regularity cannot avail to supply the want of such evidence, as to matters which should be of record, even after the lapse of more than thirty years.[95] Steps which the law makes prerequisites of sale, if not recited in the deed, should be proved *aliunde* in order to sustain the deed, although the law does not require them to be recited.[96] Where the statute is pro-

firmed by the court and therefore void. Allen *v.* Phillips, 87 Ark. 185, 112 S. W. Rep. 403.

[92] Whether a statute declaring it conclusive is constitutional, see Dawson *v.* Peter, 119 Mich. 274, 77 N. W. Rep. 997 (unconstitutional); McCready *v.* Sexton, 29 Iowa, 356, s. c., 4 Am. Rep. 214; Blackw. 80, and cases cited.

[93] Beekman *v.* Bigham, 5 N. Y. 366; Whitney *v.* Thomas, 23 N. Y. 281; Rathbone *v.* Hooney, 58 N. Y. 463.

"A tax deed introduced in evidence is not sufficient to pass title unless the notice as required by statute is also introduced in evidence. The tax deed is only color, in itself, together with *prima facie* proof of certain facts enumerated by the statute, the tax deed being a creature of the statute, and must be given that meaning and intendment, only, which the statute directs. The deed is made *prima facie* evidence of the facts enumerated in the statute, and this court cannot extend it further. Glos *v.* Mulcahy, 210 Ill. 639, 71 N. E. Rep. 629.

[94] Westbrook *v.* Willey, 47 N. Y. 457; McCready *v.* Sexton, 29 Iowa, 356, s. c., 4 Am. Rep. 214.

[95] Hilton *v.* Bender, 69 N. Y. 75, 77, rev'g 2 Hun, 1, s. c., 4 Supm. Ct. (T. & C.) 270.

A deed which is not, by statute, made *prima facie* evidence, is insufficient in and of itself and when unsupported by the record on which it is based; but the deed itself is nevertheless competent and may be produced in evidence, though, standing alone, it proves nothing. Castleman *v.* Phillipsburg Land Co., 1 Ten. Ch. App. 9.

[96] Brown *v.* Goodwin, 1 Abb. New Cas. 452.

Thus where a tax deed contained no recital that a preliminary execution had issued against the personal property of the delinquent or that he had no such personal property, such deed is not admissible until those facts are shown

hibitory in respect to conditions of power to act, recitals showing a departure from the statute cannot be helped by the presumption of regularity.[97] The presumption is indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective.

Payment of the tax may be proved by oral evidence as well as by the receipt or books of the collector.[98] The word "*paid*" on a collector's book, opposite a tax upon land, is not evidence that the taxes were paid by the person in whose name the land is assessed.[99]

16. Grantor's Title.

Plaintiff, relying on a conveyance to him from a grantor other than the State, must show that his grantor had either title, or possession claiming title.[1] If the conveyance was

by evidence *aliunde*. Smith *v.* Kyler, 74 Ind. 575.

[97] French *v.* Edwards, 13 Wall. 506, 514; and compare Walker *v.* Moore, 2 Dill. C. Ct. 256; Leland *v.* Cameron, 31 N. Y. 115.

Though the sale is invalid because conducted in violation of the statute, the tax deed may nevertheless rest in the purchaser the lien of the state. Such deed is *prima facie* evidence of the lien. Scarry *v.* Lewis, 133 Ind. 96, 30 N. E. Rep. 411.

[98] Adams *v.* Beale, 19 Iowa, 61; Stumpf *v.* Osterhage, 111 Ill. 82; Austin *v.* King, 97 N. C. 339, 2 S. E. Rep. 678.

[99] Irwin *v.* Miller, 23 Ill. 401.

[1] Dominy *v.* Miller, 33 Barb. 386; s. p., Stevens *v.* Hauser, 39 N. Y. 302, and see Smith *v.* Lawrence, 12 Mich. 431. *Contra*, Chamberlain *v.* Bradley, 101 Mass. 188, s. c., 3 Am. Rep. 331; Bolster *v.* Cushman, 34 Me. 428; and see McNitt *v.* Turner, 16 Wall. 352.

"By the great weight of authority" a defendant "can not set up another and better title than that of the common grantor, under whom he and the plaintiff claim, unless he connects himself with that better title." Greenfield *v.* McIntyre, 112 Ga. 691, 38 S. E. Rep. 44. See also Fletcher *v.* Horne, 75 Ga. 134; Richards *v.* East Tennessee, etc., R. Co., 106 Ga. 614, 33 S. E. Rep. 193, 45 L. R. A. 712.

As against a mere intruder plaintiff may recover on showing that his ancestor from whom he claims title died in possession and thereafter a tenant of the heirs occupied the premises until title was perfected by adverse possession. Beam *v.* Gardner, 18 Pa. Super. Ct. 245.

"If the plaintiff claims by descent, it is sufficient for him, in the

from one in peaceable possession claiming title at the time it was executed, this is sufficient. If from one out of possession,—as in case of wild lands,—plaintiff must show a grant from the original source of title, and a regular deduction therefrom.[2] Length of possession is not essential, unless it is relied on as adverse possession, and in that case, if sufficiently long continued, the validity of the deed is not essential.[3] The capacity of the grantor to acquire [4] and convey,[5] may be promised in the absence of evidence tending to the contrary. In the absence of evidence to the contrary, there is a presumption that the grantee took according to

first instance, to prove his heirship, and that the ancestor from whom he derives title was the person last seized of the premises in controversy. If he claims as devisee, he must, in like manner, prove the will and seisin of his devisor. The seisin of the ancestor or devisor may be proved by showing he was in actual possession of the premises at the time of his death, and in receipt of rent from the terre tenant because possession is presumptive evidence of seisin in fee until the contrary is shown." Jones *v.* Bland, 112 Pa. St. 176, 2 A. 541; Wilson *v.* Johnson, 51 Fla. 370, 41 So. Rep. 395.

A plaintiff in ejectment must show a chain of title back to some grantor in possession or to the government. Jackson Lumber Co. *v.* McCreary, 137 Ala. 278, 34 So. Rep. 850.

In tracing the title from an acknowledged valid source, it is unnecessary to show possession in each of the intermediate grantees, it being presumed. Arents *v.* Long Island R. Co., 89 Hun, 126, 34 N. Y. Supp. 1085.

[2] Tyl. Ej. 541.

"The plaintiff must trace his paper title back to someone who is shown to have been in possession of the *locus in quo*, or failing in that, he must show that his grantor acquired title from the original proprietors. Troth *v.* Smith, 68 N. J. Law 36, 52 Atl. Rep. 243.

"The plaintiff cannot recover merely on the strength of a deed to himself, without showing that his grantor had a *prima facie* right to recover, and a mere deed, unaccompanied by evidence of the grantor's seizin is not *prima facie* evidence of the grantor's title. Florida Finance Co. *v.* Sheffield, 56 Fla. 285, 48 So. Rep. 42, 23 L. R. A. N. S. 1102, 16 Ann. Cas. 1147.

[3] Stark *v.* Starr, 1 Sawy. 15.

The question of fact as to the sufficiency of the adverse possession of a remote grantor is for the trial court. Baum *v.* Roper, 132 Cal. 42, 64 Pac. Rep. 128.

[4] Yates *v.* Van De Bogert, 56 N. Y. 526.

[5] Battin *v.* Bigelow, Pet. C. Ct. 452.

the true title of the grantor, and with knowledge of it.[6] Title shown once to have existed, is presumed to continue,[7] and he who relies upon a disseizin must prove it.[8] Every presumption is in favor of possession in subordination, to the title of the true owner.[9] In proving an exchange, possession of the parcel given in exchange is relevant.[10]

17. State Grant.

A patent can be proved by a *constat*, or an exemplification of record,[11] without producing the patent itself.[12] A patent is presumptive evidence of its own regularity and validity,[13]

[6] Smith *v.* Townsend, 25 N. Y. 479.

One who takes a quit claim deed must be presumed to have had notice of outstanding equities and interests. Pope *v.* Nichols, 61 Kan. 230, 59 Pac. Rep. 257.

[7] Thomas *v.* Hatch, 3 Sumn. 170.

[8] Stevens *v.* Hauser, 39 N. Y. 302, rev'g 1 Robt. 50.

[9] Jackson *v.* Sharp, 9 Johns. 163; Jackson *v.* Waters, 12 Id. 365; Jackson *v.* Thomas, 16 Id. 293.

Thus where title to premises is in the wife, the joint possession of her husband with her is presumed to be in subordination to her recorded title. Jones *v.* Bland, 112 Pa. St. 176, 2. Atl. Rep. 541.

A stranger in possession is deemed to hold under the owner unless such possession is so open and notorious as to raise a presumption of notice to the owner that his occupancy was hostile. Wilson *v.* Johnson, 51 Fla. 370, 41 So. Rep. 395.

A party taking possession of land under another is not allowed to dispute the latter's title until he has abandoned such possession. Campbell *v.* Everhart, 139 N. C. 503, 52 S. E. Rep. 201.

[10] Moss *v.* Culver, 64 Penn. St. 414, s. c., 3 Am. Rep. 601.

If the deed of exchange is defective, the party who takes possession of land thereunder may acquire a perfect title by continuing such possession for the statutory period as an adverse holder. Hall *v.* Caperton, 87 Ala. 285, 6 So. Rep. 388.

[11] McKineron *v.* Bliss, 31 Barb. 180, affi'd on other grounds, as McKinnon *v.* Bliss, 21 N. Y. 206, and see McGarrahan *v.* Mining Company, 96 U. S. (6 Otto) 316.

[12] Patterson *v.* Winn, 5 Pet. 233.

[13] Jackson *v.* Marsh, 6 Cow. 281; People *v.* Mauran, 5 Den. 389; United States *v.* Stone, 2 Wall. 525, 535.

A defendant in possession who defends his right on the ground that the government placed him in possession must show that the right of the government is paramount to that of the plaintiff. Scranton *v.* Wheeler, 113 Mich. 565, 71 N.

and at common law conclusive, except as against evidence showing it to be absolutely void. Evidence, oral or written, which shows a want of power in officers who issue a patent, is admissible, even in an action at law, to defeat a title set up under it.[14] The due performance of official acts may be presumed in support of its validity.[15] The rules usual for presuming a lost grant do not avail to the same extent, to prove a grant by the government.[16]

18. Landlord and Tenant.

In ejectment between landlord and tenant, the lease should be proved,[17] and it is sufficient evidence of plaintiff's title.[18] The landlord's execution of the lease, even where he sues to rescind it as void, is competent in evidence as an act of ownership, and is *prima facie* evidence of title, even though defendants are only connected with it by evidence that they are in possession of the demised premises.[19] It is for them to show that their possession is referable to some other title.[20]

W. Rep. 1091, 67 Am. St. Rep. 484. See Northern Pac. Ry. Co. *v.* George, 51 Wash. 303, 98 Pac. Rep. 1126.

[14] Sherman *v.* Buick, 93 U. S. (3 Otto) 209.

[15] Jackson *v.* Cole, 4 Cow. 587; Cofield *v.* McClelland, 16 Wall. 331, 335; Carpenter *v.* Rannels, 19 Id. 138, 146, but compare U. S. *v.* Jonas, 19 Wall. 598, 604.

[16] Oaksmith's Lessee *v.* Johnston, 92 U. S. (2 Otto) 343, 345.

A person taking possession of a portion of the public domain may, as long as his possession continues, hold it against all persons except the United States. Price *v.* Brockway, 1 Alaska, 233.

[17] Presumptions arising from the lapse of time will aid defects in the proof of the lease. Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633; Carver *v.* Jackson, 4 Pet. 1. If the demise was oral, it may be proved by any person present at the making of it, or by circumstances, such as the payment of rent. Tyl. Ej. 550. An agreement for a lease is not enough without proof of rent paid if the tenant claims to hold adversely. Jackson *v.* Cooly, 2 Johns. Cas. 223.

[18] Stott *v.* Rutherford, 92 U. S. (2 Otto) 107. See chapter XXVIII, paragraph 2 of this vol.

The rule that a lessee cannot dispute his landlord's title extends to one who takes under a contract of purchase. Wolf *v.* Holton, 92 Mich. 136, 52 N. W. Rep. 459.

[19] Magdalen Hospital *v.* Knotts, 36 Weekly R. 640.

[20] Id. *Contra*, Caldwell *v.* Center, 30 Cal. 539.

Notice to quit is not necessary under a demise for a term to expire at a time certain.[21]

Where a tenancy expired by notice to quit, the service of the notice may be proved by the testimony of the person making it, or of any eye witness,[22] or by memorandum or entry made contemporaneously in the ordinary course of duty by the person who made the service, he being since deceased.[23] The authority of an agent giving the notice may be proved as in other cases of agency, except that a subsequent ratification will not enure to bind the tenant by a notice not authorized when given.[24] The contents of the notice may be proved by producing a duplicate original,[25] or if that cannot be done, by oral evidence, without having given defendant notice to produce the original.[26] The fact that the period contemplated by the notice had expired when the action was brought, may be shown presumptively by the admission of the tenant; and this is conclusive if express and acted on.[27] The refusal of the tenant to

[21] Tyl. Ej. 207; Gregg *v.* Von Phul, 1 Wall. 274. See also Larned *v.* Hudson, 60 N. Y. 102; Smith *v.* Littlefield, 51 N. Y. 539; People ex rel. Aldhouse *v.* Goelet, 14 Abb. Pr. N. S. 130, s. c., 64 Barb. 476; Adams *v.* Cohoes, 127 N. Y. 175, 28 N. E. Rep. 25.

Where by the terms of the lease such notice is waived, none is necessary. Belinski *v.* Brand, 76 Ill. App. 404.

"A landlord, . . . may recover against his tenant, when the tenancy has expired, without making any other showing, than that recognition of title which is always implied in tenancy." Kinney *v.* Harrett, 46 Mich. 87, 8 N. W. Rep. 708.

[22] Tyl. Ej. 551.

The testimony of a constable to the effect that he served the notice to quit, by leaving an attested copy with a person on the demised premises who, he had reason to believe, was the wife of the lessee, is sufficient to raise the presumption that the defendant received the notice. Steese *v.* Johnson, 168 Mass. 17, 46 N. E. Rep. 431.

[23] Doe d. Patteshall *v.* Turford, 11 Mees. & W. 773, and see Leland *v.* Cameron, 31 N. Y. 115.

[24] See Tyl. Ej. 552.

[25] Tory *v.* Orchard, 2 Bos. & P. 41.

[26] Falkner *v.* Beers, 2 Doug. (Mich.) 117.

[27] Tyl. Ej. 552, and cases cited, chapter XXVIII, paragraph 10 of this vol. For mode of proving commencement of action, see chapter XLVII, paragraph 2 of this vol.

admit the tenancy may be proved in lieu of a notice to quit.[28]

19. Mortgagor and Mortgagee.[29]

The mortgage is sufficient evidence of title as against the mortgagee. If overdue, default and forfeiture may be presumed. As against third persons, plaintiff must also show their tenancy, and either that it has been determined or that it is subject to the mortgage.[30]

20. Vendor and Purchaser.

A vendor suing for possession, after default on the part of the purchaser, should prove the contract,[31] and default, and that defendant was in possession at the commencement of the action. This is sufficient.[32] The contract is conclusive evidence of plaintiff's title.[33] Notice to quit is not necessary

[28] Tyl. Ej. 553; Goodman *v.* Malcolm, 5 Kan. App. 285, 297, 48 Pac. Rep. 439.

[29] By statute, in New York, the mortgagee cannot bring ejectment, N. Y. Code Civ. Pro., Sec. 1498, and his remedy against the mortgagor is by action to redeem. Hubbell *v.* Moulson, 53 N. Y. 225.

When a third person enters upon mortgaged property the mortgagor may maintain ejectment and the mortgagee is a proper but not a necessary party. Bartlett *v.* Borden, 13 Bush. (Ky.), 45.

[30] Tyl. Ej. 543–549.

The defendant cannot set up a mortgage in which he has no interest to defeat a recovery on ejectment. Woods *v.* Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513.

[31] See chapter XXVII, paragraph 1 etc., of this vol.

There is nothing in the relation of grantor and grantee which will prevent the former from acquiring a title by adverse possession. But in order to acquire such a title the intention must be manifested by some unequivocal act of hostility, whereas, as between parties who are strangers in title, possession, and the exercise of acts of ownership, are in themselves, in the absence of explanatory evidence, proof that the holding is adverse. Graham *v.* St. Louis, etc., Ry. Co., 69 Ark. 562, 65 S. W. Rep. 1048, 66 S. W. Rep. 344.

[32] Tyl. Ej. 558; Frisbie *v.* Price, 27 Cal. 253.

[33] Jackson *v.* Ayres, 14 Johns. 224; Jackson *v.* Britton, 4 Wend. 507. Upon principles already stated respecting tenant's estoppel. See chapter XXVIII, paragraph 12 of this vol.

if defendant is put in the wrong by evidence of breach, making his possession tortious.[34]

21. Entry.

The New York statute[35] dispenses with proof of actual entry in all cases.[36]

22. Title by Descent or Devise.

The modes of proof have already been stated.[37] More strict proof of death is required, to establish title in ejectment, than where the question arises incidentally and collaterally.[38]

23. Dower.

In those States where dower may be recovered by ejectment, the ordinary rules of the action apply.[39] The marriage may be proved by indirect evidence. Evidence of the

[34] Gregg *v.* Von Phul, 1 Wall. 274, Tyl. Ej. 558.

[35] 2 N. Y. R. S. 306, § 25. Now covered by Code Civ. Pro., Chapter XIV.

[36] Lawrence *v.* Williams, 1 Duer, 585. So, also, in England. Dumpor's Case, 1 Smith's L. Cas. 93, 108. To prove a legal entry in avoidance of an estate, there must be an intent to enter for the purpose of taking actual or constructive possession, not merely to make a demand or for other purpose. If the lessor making the entry declares that he comes for a different purpose, he cannot subsequently sustain it by proving a purpose to take possession for the forfeiture. Dumpor's Case, 1 Smith's L. Cas. 93, 107. Where a party has a legal right to enter in one character, or under one title, the law presumes that his entry was in that character, and under that title, and not as a trespasser. Benson *v.* Bolles, 8 Wend. 175.

[37] Chapter V of this vol.

In an action of ejectment brought by a guardian for the benefit of wards claiming by descent, a *prima facie* case is made by proving paper title to the ward's ancestor, its devolution to the wards, and the plaintiff's title as guardian to sue for possession. Harrett *v.* Kinney, 44 Mich. 457, 7 N. W. Rep. 63.

[38] Carroll *v.* Carroll, 60 N. Y. 121, 125, rev'g 2 Hun, 609, 6 Supm. Ct. (T. & C.) 294, 16 Abb. Pr. N. S. 239.

[39] Tyl. Ej. 172.

An action of ejectment cannot be maintained for dower in New York. Code Civ. Pro., § 1499. For method prescribed under the Code see §§ 1596–1625.

husband's seizin, which would be sufficient to authorize a recovery by the heir, is enough.[40] Proof of actual possession in the husband or his tenant is presumptive evidence of seizin.[41] A purchaser from the husband is not estopped from denying that he had an absolute estate.[42] Evidence of the husband's declarations and admissions are competent against the widow, equally as against the heir.[43]

A variance in respect to the extent of the premises,[44] or the character of the tenure,[45] may be cured by amendment. Admeasurement shown by a regular record is presumed, in the absence of evidence, to have been made on the widow's application and with her assent.[46] It is con-

[40] "The true and substantial test of the right of dower is that the issue of the wife by the marriage might inherit the estate from the husband as his heir or heirs." Butler *v.* Cheatham, 8 Bush (Ky.), 594; Jackson *v.* Waltermire, 5 Cow. 299; Carpenter *v.* Weeks, 2 Hill, 341. A deed and mortgage, differently dated, may be shown by parol to have been simultaneously delivered, so as to disprove continuing seizin. Mayberry *v.* Brien, 15 Pet. 21. A mortgage executed, acknowledged and recorded on the same day as a deed of the same premises will be presumed, (the parties to the deed and mortgage being the same) to be a purchase money mortgage and therefore rights of the mortgagee have priority over the claim of the widow for dower. Harrow *v.* Grogan, 219 Ill. 288, 76 N. E. Rep. 350.

In order for the widow to recover it must appear that the husband was seized, either in fact or in law, of a present freehold in the premises as well as of an estate of inheritance. Phelps *v.* Phelps, 143 N. Y. 197, 38 N. E. Rep. 280, 25 L. R. A. N. S. 625.

[41] Carpenter *v.* Weeks, 2 Hill, 341. But see Barnes *v.* Raper, 90 N. C. 189, and McDonald *v.* McDonald, 120 Ga. 403, 47 S. E. Rep. 918.

It has been held that no actual possession on the part of the husband is necessary in order to entitle the widow to dower. Bartlett *v.* Tinsley, 175 Mo. 319, 75 S. W. Rep. 143.

[42] Cooper *v.* Whitney, 3 Hill, 95; Foster *v.* Dwinel, 1 Am. L. Reg. N. S. 604 and note of REDFIELD, J. Unless, perhaps, when he derives all his title by that deed. McLeery *v.* McLeery, 5 Me. 172, s. c., 20 Am. Rep. 683, 686, and cases cited.

[43] Van Duyne *v.* Thayre, 14 Wend. 233; Keator *v.* Dimmick, 46 Barb. 158. *Contra*, Derush *v.* Brown, 8 Ohio, 413.

[44] Bear *v.* Snyder, 11 Wend. 592.

[45] Borst *v.* Griffin, 9 Wend. 307.

[46] Tilson *v.* Thompson, 10 Pick. 359.

clusive as to the location and extent,[47] but is not evidence of title.[48]

24. Curtesy.

In general, evidence of actual seizin is necessary.[49] Under the married woman's act, curtesy may be defeated by evidence that the wife devised or conveyed.[50] A tenant by the curtesy, holding possession, is presumed to hold as such tenant, and not adversely, though he have a void deed of the fee.[51]

25. Title Under Ancient Instrument.

An ancient deed or will, or other instrument of title,[52] may be admitted in evidence without direct proof of execution,[53] when shown to have come from proper custody, and appearing to be of the age of at least thirty years,[54] if either a

[47] Jackson *v.* Hixon, 17 Johns. 123; Jackson *v.* Churchill, 7 Cow. 287.

[48] Jackson *v.* Randall, 5 Cow. 168; Jackson *v.* De Witt, 6 Id. 316. At least not conclusive. Parks *v.* Hardey, 4 Bradf. 15; Wood *v.* Seely, 32 N. Y. 105.

As to computing a gross sum in lieu, compare the statute, Code Civ. Pro., § 1617 and § 1618, with note to paragraph 45.

[49] Ferguson *v.* Tweedy, 43 N. Y. 543, affi'g 56 Barb. 168; or at least evidence excluding the idea of actual seizin in a stranger. 2 Abb. N. Y. Dig. new ed. 493. Compare Young *v.* Langbein, 7 Hun, 151.

This is the common law rule. It has been changed in some of the states by statute. Nixon *v.* Williams, 95 N. C. 103.

For instance, in North Carolina, neither actual nor legal seizin is any longer necessary under its statute. Sears *v.* McBride, 70 N. C. 152.

[50] Lansing *v.* Gulick, 26 How. Pr. 250, and cases cited; Matter of Winne, 2 Lans. 21, rev'g 1 Lans. 508.

[51] Corwin *v.* Corwin, 6 N. Y. 342, rev'g 9 Barb. 219.

[52] Otherwise of an ancient account adduced in support of title, though found with the title deeds. Jackson *v.* Murray, Anth. N. P. 143. Compare Roe *v.* Rawlings, 7 East, 279.

Every presumption is in favor of the authority and authenticity of ancient documents. McGuire *v.* Blount, 26 S. Ct. 1, 199 U. S. 142, 5 L. Ed. 125.

[53] For the general rule, see Enders *v.* Sternbergh, 2 Abb. Ct. App. Dec. 31.

[54] Woods *v.* Montevallo Coal, &c. Co., 84 Ala. 560, 5 Am. St.

corresponding possession under it [55] for at least thirty years [56] is shown, or if such account of it be given as may reasonably be expected under all the circumstances of the case, and as affords a presumption that it is genuine.

There must always be possession or other corroborating proofs.[57] Where these are shown, the fact that an attesting

Rep. 393, 3 So. Rep. 475. Where an ancient deed, otherwise admissible, is offered in evidence, it is immaterial that its proof or acknowledgment was insufficient to admit it to record. Frost *v.* Wolf, 77 Tex. 455, 19 Am. St. Rep. 761, 14 S. W. Rep. 440. The handwriting of signatures to unauthorized indorsements or certificates may be proved, for the purpose of showing the antiquity. Jackson *v.* Laroway, 3 Johns. Cas. 283.

A recital contained in an ancient instrument, which comes from the proper custody and is followed by possession of the land, is a circumstance from which it may be presumed that a bond for title had been executed. Blount *v.* Bleker, 13 Tex. Civ. A. 227, 35 S. W. Rep. 863.

[55] Crowder *v.* Hopkins, 10 Paige, 183.

Where a few of the ancient links in a title are missing, but they are all recited in subsequent conveyances, such recitals, taken in connection with the possession and claim of ownership of the premises in harmony with them, are deemed to create a conclusive presumption of the truth of the recitals. Dosoris Pond Co. *v.* Campbell, 25 N. Y. App. Div. 179, 50 N. Y. Supp. 819, aff'g 164 N. Y. 596, 58 N. E. Rep. 1087.

[56] Staring *v.* Bowen, 6 Barb. 109.

Less is not enough (Jackson *v.* Blanshan, 3 Johns. 292), unless there be the aid of some evidence of execution. Jackson *v.* Luquere, 5 Cow. 221.

The mere fact, however, that a deed is over 30 years old does not dispense with proof of the title or possession of the grantor, especially where the evidence fails to show that the deed antedated the occupancy of the defendant of the land in question. McClellan *v.* Zwingh, 70 Hun, 600, 24 N. Y. Supp. 371.

[57] Wilson *v.* Betts, 4 Den. 201; S. P., Clark *v.* Owens, 18 N. Y. 434; Ridgeley *v.* Johnson, 11 Barb. 527. It is usually impossible to establish a very ancient possession of property by the testimony of persons having knowledge of the fact, and when a deed forming part of a chain of title is so ancient that there can be, in the nature of things, no living persons who can testify to acts of ownership by the grantor or grantee, it may be received in evidence without such proof. Greenleaf *v.* Brooklyn, &c. R. Co., 132 N. Y. 408, 414, 30 N. E. Rep. 762; Jackson *v.* Laroway, 3 Johns. Cas. 283; Jackson ex dem Hunt *v.* Luquere, 5 Cow. 221; Hewlett *v.* Cock, 7 Wend. 371;

witness is living, within the jurisdiction, does not make it essential to produce him.[58] The presumption may be rebutted.[59]

Evidence of handwriting is admissible in aid of the presumption; and, in qualification of the general rule already stated,[60] it is to be observed that where, from the antiquity of the writing, it is impossible for any living witness to swear that he ever saw the party write, comparison is allowed, from necessity, with documents known to be in his handwriting, though not otherwise in evidence.[61]

26. Lost Instrument, and Secondary Evidence.

Notice to a party to the action to produce an instrument, is regular though the instrument be in possession of his grantor; and plaintiff need not call such grantor as a witness.[62] A deed produced, by a party to it and to the action, pursuant to notice to produce, may be read in evidence without proof of its execution, unless there is evidence impeaching it.[63] Secondary evidence may be given of a

Ensign *v.* McKinney, 30 Hun, 249; Rogers *v.* Allen, 1 Camp. 309; Doe *v.* Pulman, 3 Ad. & El. N. R. 622; Malcomson *v.* O'Dea, 10 H. L. Cas. 593; Bristow *v.* Cormican, L. R. 3 App. Cas. 641–668; Gardner *v.* Grannis, 57 Ga. 539; Whitman *v.* Heneberry, 73 Ill. 109.

[58] Jackson *v.* Christman, 4 Wend. 277.

[59] Wilson *v.* Betts (above); Meegan *v.* Boyle, 19 How. U. S. 130.

[60] Chapter XXI, paragraphs 5–18 of this vol.

[61] Strother *v.* Lucas, 6 Pet. 763; Jackson *v.* Brooks, 8 Wend. 426; West *v.* State, 22 N. J. L. (2 Zab.) 212, 241; Sweigart *v.* Richards, 8 Penn. St. 436.

[62] Jackson *v.* Livingston, 7 Wend. 136; Corbin *v.* Jackson, 14 Id. 619.

Where the proof shows that a missing document which is not in the possession of the adverse party, is probably in the possession of some other person of whom no inquiry has been made, secondary evidence of its contents is inadmissible. To admit such evidence, it must appear that inquiries were made, without result, of all persons who, under the circumstances, would be likely to have either the document or knowledge of its whereabouts. Alvord *v.* Spring Valley Gold Co., 106 Cal. 547, 40 Pac. Rep. 27.

[63] Betts *v.* Badger, 12 Johns. 223; McGregor *v.* Wait, 10 Gray (Mass.),.72.

document, lost or destroyed without the fault of the party offering it,[64] although such document be one which, by reason of age, proved itself without ordinary proof of execution. In such a case the same principle of necessity which admits secondary evidence of its contents, allows proof, by

[64] Parol testimony is not admissible to prove the contents of a written document until its absence is accounted for. Dempster Mill Mfg. Co. *v.* First Nat. Bank, 49 Neb. 321, 68 N. W. Rep. 477; Gillespie *v.* Gillespie, 159 Ill. 84, 42 N. E. Rep. 305; advertisement is not pre-requisite. Willett *v.* Andrews, et al., 106 La. 319, 30 So. Rep. 883. The person last known to have been in possession of the paper must be examined as a witness, to prove its loss, and even if he is out of the state, his deposition must be procured if practicable, or some good excuse given for not doing so. Deaver *v.* Rice, 2 Ired. (N. C.) 280; Haywood *v.* Townsend, 4 N. Y. App. Div. 246, 38 N. Y. Supp. 517; Dickinson *v.* Breeden, 25 Ill. 186; Bunch's Adm'r *v.* Hurst, 3 Desaus. Eq. (S. C.) 273; Turner *v.* Yates, 16 How. (U. S.) 14; Parkins *v.* Cobbet, 1 C. & P. 282; Wiseman *v.* North Pac. R. Co., 20 Ore. 425, 23 Am. St. Rep. 135; 26 Pac. Rep. 272; Morton *v.* Heidorn, 135 Mo. 608, 37 S. W. Rep. 504. But see Manning *v.* Maroney, 87 Ala. 563, 13 Am. St. Rep. 67, 6 So. Rep. 343. And the general rule is that the party alleging the loss of a material paper, where such proof is necessary for the purpose of giving secondary evidence of its contents, must show that he has in good faith exhausted, to a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. Simpson *v.* Dall, 3 Wall. 460, 475; Kearney *v.* Mayor, &c., 92 N. Y. 617, 621. It is not necessary to prove the loss beyond all possibility of mistake. A reasonable probability of loss is sufficient, and this may be shown by a *bona fide* and diligent search, fruitlessly made for it in places where it was likely to be found. Woods *v.* Montevallo, &c. Co., 84 Ala. 560, 5 Am. St. Rep. 393, 3 So. Rep. 475. A lost instrument cannot be proved by a certified copy of its record in the absence of a statue which expressly authorizes the admission of such evidence, nor is an unauthorized record of such instrument any evidence of its contents. Union Pac. Ry. Co. *v.* Reed, 49 U. S. App. 233, 80 Fed. Rep. 234. An offer to admit the effect of written documents does not render them admissible in evidence. Milligan *v.* Sligh Furniture Co., 111 Mich. 629, 70 N. W. Rep. 133. The principle which requires production of writing to prove its contents, and excludes parol proof thereof, has no application when the inquiry into its contents comes up collaterally at the trial, and the contents are not directly involved in the controversy. Faulcon *v.*

testimony, of its general appearance and of its marks of antiquity.[65] Parol evidence of the contents of a lost deed should show substantially all the contents. A small portion is not enough;[66] but evidence is sufficient which enables the court to approximate to the date, and to determine the character, the parties, and the premises conveyed.[67]

27. Presumed Grant.

The cases in which a grant is presumed are chiefly of three classes.

1. Where one has been in possession under claim of right for a great lapse of time (the period fixed by the statute of limitations is usually followed[68]), sufficient to justify an inference of rightful enjoyment, a grant may be presumed for the sake of quieting his title and possession, unless the circumstances are equally consistent with the idea that he had none.[69] This presumption is aided by evidence that he had a right to a grant. To raise this presumption, some evidence must be given tending to show title good in substance (though wanting some essential matter to make it formally complete), and a possession consistent with the grant to be

Johnston, 102 N. C. 264, 11 Am. St. Rep. 737, 9 S. E. Rep. 394.

[65] Enders *v.* Sternbergh, 2 Abb. Ct. App. Dec. 31, rev'g 52 Barb. 222.

[66] So held in trespass. Edwards *v.* Noyes, 65 N. Y. 125, and see Metcalf *v.* Van Benthuysen, 3 N. Y. 424.

[67] Kent *v.* Harcourt, 33 Barb. 491.

[68] Ricard *v.* Williams, 7 Wheat. 59; Flora *v.* Carbean, 38 N. Y. 111. Compare Barclay *v.* Howell, 6 Pet. 498; Mitchel *v.* United States, 9 Pet. 711, 760.

[69] Ricard *v.* Williams, 7 Wheat. 59, 109; Schauber *v.* Jackson, 2 Wend. 14; Flora *v.* Carbean, 38 N. Y. 111. "Without going at length into the subject, it may be safely considered that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive, and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law." United States *v.* Chaves, 159 U. S. 452, 464, 16 Sup. Ct. Rep. 57; State *v.* Dickinson, 129 Mich 221, 88 N. W. Rep. 621.

presumed.[70] But very slight circumstances will authorize the inference after a great lapse of time.[71]

2. Where those claiming title show themselves to have been entitled to a conveyance from trustees in conformity to the trust, or from others in pursuance of a contract, a grant may be conclusively presumed against a person in possession without right.[72]

3. Where defendant not claiming title but only possession, gives evidence tending to raise an inference that plaintiff, or those under whom he claims had divested themselves of title by a conveyance to some third person, the jury may infer a grant;[73] but the law does not presume it.[74]

28. Deed Void for Adverse Possession.

Showing possession in a third person is not enough; it must be shown to be adverse,[75] and under the claim of some

[70] Enders *v.* Sternbergh, 2 Abb. Ct. App. Dec. 31, rev'g 52 Barb. 222. Though as a general rule it is only where the possession has been actual, open, and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land, that the presumption of a deed can be invoked; yet that presumption may properly be invoked where a proprietary right has been exercised beyond such statutory period, although the exclusive possession of the whole property, to which the right is asserted, may have been occasionally interrupted during such period, if, in addition to the actual possession, there have been other open acts of ownership. Fletcher *v.* Fuller, 120 U. S. 534.

[71] Russell *v.* Jackson, 22 Wend. 276, 282, affi'g 4 Id. 543.

[72] Schauber *v.* Jackson, 2 Wend. 14, 32, *per* WALWORTH, Ch., dissenting; French *v.* Edwards, 21 Wall. 147, and a further decision in 5 Sawy. 266.

[73] Schauber *v.* Jackson, 2 Wend. 14, 63. *Contra*, Doe *v.* Butler, 3 Wend. 149. The presumption is one of fact, and it is for the jury to determine the effect of the evidence in support of that presumption. Herndon *v.* Vick, 89 Tex. 469, 35 S. W. Rep. 141.

[74] Schauber *v.* Jackson (above).

[75] Stevens *v.* Hauser, 39 N. Y. 302, rev'g 1 Robt. 50.

A vendor retaining possession is deemed to hold in subordination to the grantee and "a clear, positive and continued disclaimer and disavowal of such relation, and the assertion of an adverse right, brought home to the knowledge of the true owner, are indispensable to change the character of the

specific title[76] asserted in good faith.[77] The adverse possession must be clearly and positively proved.[78] If the deed is shown to have been made by the true owner, every presumption is in favor of a possession in subordination to his title.[79]

29. Impeaching on Equitable Grounds.

Under the new procedure a deed, or other muniment of title, may be impeached on equitable grounds.[80] A party

grantor's possession and render it adverse to the grantee." Schaubuch *v.* Dillemuth, 108 Va. 86, 60 S. E. Rep. 745, 15 Ann. Cas. 825.

[76] Crary *v.* Goodman, 22 N. Y. 170.

" 'Color of title' is that which appears to be, but in reality is not, title." W. O. Whitney Lumber, etc., Co. *v.* Crabtree, 166 Fed. Rep. 738, 92 C. C. A. 400.

[77] Livingston *v.* Peru Iron Co., 9 Wend. 511, rev'g 2 Paige, 390.

[78] Wickham *v.* Conklin, 8 Johns. 220; Jackson *v.* Sharp, 9 Id. 163; Jackson *v.* Watters, 12 Id. 365; Howard *v.* Howard, 17 Barb. 663; but compare La Frombois *v.* Jackson, 8 Cow. 589.

Adverse possession is a question of fact and when found by the trial court will not be reviewed on appeal as a conclusion from evidential facts unless it appears that these facts are legally or logically necessarily inconsistent with the conclusion. Layton *v.* Bailey, 77 Conn. 22, 58 Atl. Rep. 355.

[79] Jackson *v.* Sharp, 9 Johns. 163; Jackson *v.* Waters, 12 Id. 365.

[80] The common law rule, excluding all defenses in ejectment which are not legal, has been abrogated in many of the States. See for example, Cheney *v.* Crandell, 28 Colo. 383; 65 Pac. Rep. 56, Shaw *v.* Hill, 83 Mich. 322, 47 N. W. Rep. 247, 21 Am. St. Rep. 607; Bell *v.* Champlain, 64 Barb. (N. Y.) 396; Frazier *v.* Jenkins, 9 Kan. App. 850, 62 Pac. Rep. 354; Requa *v.* Holmes, 19 How. Pr. 430. But the federal courts and a few of the state courts still adhere to the old rule. Schoolfield *v.* Rhodes, 82 Fed. Rep. 153, 27 C. C. A. 95; McFall *v.* Kirkpatrick, 236 Ill. 281, 86 N. E. Rep. 139; Harret *v.* Kinney, 44 Mich. 457; 7 N. W. Rep. 63, Rathbone *v.* Hamilton, 4 App. Cas. D. C. 475. The United States courts have, however, departed from the common law rule in cases of equitable estoppel. National Nickel Co. *v.* Nevada Nickel Syndicate, 112 Fed. Rep. 44, 50 C. C. A. 113. Where equitable defenses are allowed, they must be pleaded by the weight of authority to be availed of. Barson *v.* Mulligan, 77 N. Y. App. Div. 192, 79 N. Y. Supp. 31; Willey *v.* Greenfield, 64 N. Y. App. Div. 220, 71 N. Y. Supp. 1046; Patterson *v.* Galliher, 122 N. C. 511, 29 S. E. Rep. 773. *Contra*, East *v.* Peden, 108 Ind. 92, 8 N. E.

who has read the instrument in evidence, for the purpose of showing the nature of his adversary's claim, is not thereby precluded from impeaching the instrument.[81]

30. Admissions and Declarations.

A party cannot prove or disprove title to land by his adversary's parol admission of title or of the want of it.[82] But in support of other legal evidence of title, evidence of a general admission, or even an indirect recognition, is competent,[83] and is sufficient against a mere intruder.[84]

Wherever the declaration of one having or claiming title to real estate would be competent against him, it is competent against persons subsequently deriving title through or from him, provided that it was made while he held all the title which they obtained or can claim;[85] but it is not

Rep. 722, holding defense admissible under general denial. Defendants cannot found an equitable defense upon a contract of sale which has been broken by them. Howard *v.* Hewitt, 139 Cal. 614, 73 Pac. Rep. 414.

[81] Remington *v.* Linthicum, 14 Pet. 84.

[82] Walker *v.* Dunspaugh, 20 N. Y. 170; Jackson *v.* Miller, 6 Cow. 751, 755; Jackson *v.* Cary, 16 Johns. 302, 306; McPhaul *v.* Gilchrist, 7 Ired. (N. C.) L. 169, 173; Suttle *v.* Richmond, etc., R. Co., 76 Va. 284.

Declarations of one in possession are admissible, not as evidence of title, but in explanation of his possession and of the grounds upon which he claims possession. Trinity County Lumber Co. *v.* Pinckard, 4 Tex. Civ. App. 671, 23 S. W. Rep. 720, 1015; Parkersburg Indus. Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. Rep. 255.

[83] Jackson *v.* Dobbin, 3 Johns. 223; Jackson *v.* Croy, 12 Johns. 427.

It has been held error to exclude evidence of statements made by the defendant tending to show that he did not claim title to the premises in question. Conselyea *v.* Van Dorn, 129 App. Div. 520, 114 N. Y. Supp. 61.

[84] Sykes *v.* Hayes, 5 Biss. 529.

Admissions of one of the defendants are admissible if tending to establish his participation in another defendant's acts of disseizin. Foote *v.* Brown, 81 Conn. 218, 70 Atl. Rep. 699.

[85] Chadwick *v.* Fonner, 69 N. Y. 407; Henderson *v.* Wanamaker, 49 U. S. App. 174, 79 Fed. Rep. 736; New Jersey Zinc Co. *v.* Lehigh Zinc Co., 59 N. J. Law 189, 35 Atl. Rep. 915; Smith *v.* McClain, 146 Ind. 77, 45 N. E. Rep. 41; Williams *v.* Harter, 121 Cal. 47, 53 Pac. Rep. 405; Parkersburgh Industrial Co.

competent for the purpose of impeaching or destroying a record title.[86] Such declarations may be given in evidence even in an action between third parties where the title comes in question.[87] Declarations made after he contracted to convey, but before conveying, are competent,[88] but those made after he conveyed [89] (even though while he continued

v. Schultz, 43 W. Va. 470, 27 S. E. Rep. 255; Boynton *v.* Miller, 144 Mo. 681, 687, 46 S. W. Rep. 754; Finch *v.* Garrett, 102 Iowa, 381, 71 N. W. Rep. 429; Sparling *v.* Wells, 24 App. Div. 584; Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. Rep. 163; Roberts *v.* Rice, 69 N. H. 472, 45 Atl. Rep. 237. When a party has had adverse possession of land for a period sufficient to vest title, an admission after that period that the title is in another, will not operate to divest the title out of the party making the admission. But such an admission, whether made during or after the operation of a period sufficient to ripen an adverse possession into a perfect title, is admissible in evidence, and may be looked to by the jury in determining whether the possession was actually adverse, or was subservient to the true title. Jones *v.* Williams, 108 Ala. 282, 19 So. Rep. 317. The declarations of such person, as to the source of his title, or the manner in which he acquired the property are not admissible. McLeod *v.* Bishop, 110 Ala. 640, 20 So. Rep. 130. The declarations need not have been made on the land. Abeel *v.* Van Gelder, 36 N. Y. 513, 516; Smith *v.* McNamara, 4 Lans. 169. Actual or constructive possession is enough. Id. Fry *v.* Stowers, 92 Va. 13, 16, 22 S. E. Rep. 500.

[86] Gibney *v.* Marchay, 34 N. Y. 304. The statements of a grantor are inadmissible to invalidate his deed. Shea *v.* Murphy, 164 Ill. 614, 45 N. E. Rep. 1021; Dudley *v.* Hurst, 67 Md. 44, 1 Am. St. Rep. 368, 8 Atl. Rep. 901; Matteson *v.* Hartmann, 91 Wis. 485, 65 N. W. Rep. 58.

[87] Lyon *v.* Ricker, 141 N. Y. 225, 36 N. E. Rep. 189; McLeod *v.* Swain, 87 Ga. 156, 27 Am. St. Rep. 229, 13 S. E. Rep. 315.

[88] Chadwick *v.* Fonner (above); Corbin *v.* Jackson, 14 Wend. 619.

[89] Kain *v.* Larkin, 131 N. Y. 300, 312, 30 N. E. Rep. 105; Williams *v.* Williams, 142 N. Y. 156, 36 N. E. Rep. 1053; Hutchins *v.* Hutchins, 98 N. Y. 56, 64; Welcome *v.* Mitchell, 81 Wis. 566, 29 Am. St. Rep. 913, 51 N. W. Rep. 1080; Wilson *v.* Anderson, 186 Pa. St. 531, 40 Atl. Rep. 1096; Zobel *v.* Bauersacks, 55 Neb. 20, 75 N. W. Rep. 43; Ruckman *v.* Cory, 129 U. S. 387. Where one party introduces as original evidence declarations of a party while in possession of land, to show that his holding was not adverse, the other party in reply and to rebut this testimony may introduce his declarations in his favor when they accompany acts,

in the occupation by sufferance [90]), are not competent against those claiming under him.[91] Declarations in disparagement

or proposed acts, of ownership. Metz *v.* Metz, 48 S. C. 472, 26 S. E. Rep. 787; Fyffe *v.* Fyffe, 106 Ill. 646.

[90] Vrooman *v.* King, 36 N. Y. 477, 483, 2 Whart. Ev., § 1165, and cases cited. *Contra*, Adams *v.* Davidson, 10 N. Y. 309.

[91] The cases on this subject are innumerable, and to a considerable extent irreconcilable. It seems, however, to be well settled that the declarations of a grantor, made after conveyance and in derogation of his title, are not admissible against his grantee. Fyffe *v.* Fyffe, 106 Ill. 646; Jones *v.* Tennis Coal Co., 94 S. W. Rep. 6, 29 Ky. Law 623. The following rules I deem safe guides in the application of the principle stated in the text, agreeably to the present general canons of evidence:

1. If it is a question whether a person was in possession at a given time, his acts of ownership at that time, and his declarations and admissions made in connection with such acts, and characterising them, are competent. Perkins *v.* Blood, 36 Vt. 273, 282; Young *v.* Adams, 14 B. Monr. (Ky.) 127, 132; Andrews *v.* Fleming, 2 Dall. 93; St. Clair *v.* Shale, 9 Pa. St. 252; West *v.* Price, 2 J. J. Marsh. (Ky.) 380; Comins *v.* Comins, 21 Conn. 413.

2. If a party, or one under whom a party claims, is shown to have been in possession (Ellis *v.* Janes, 10 Cal. 456; Reed *v.* Dickey, 1 Watts [Penn.], 152), and it is a question whether he held under claim of title, and if so what claim, his declarations and admissions (including entries and memoranda; Hodgdon *v.* Shannon, 44 N. H. 572; Rand *v.* Dodge, 17 N. H. 343, 356) made while in possession, and characterising his claim of title, are competent. Enders *v.* Sternbergh, 2 Abb. Ct. App. Dec. 31, rev'g 52 Barb. 222; Sample *v.* Robb, 16 Pa. St. 305, 319; Jackson *v.* Bard, 4 Johns. 230; Fellows *v.* Fellows, 37 N. H. 75, 84.

3. If it is a question what were the boundaries of his possession, his acts done upon the land (and equally his declarations, made while in possession), and defining his then actual boundary, are competent evidence of the location of the line; but not of the title (Bower *v.* Earl, 18 Mich. 367, 376; Van Blarcom *v.* Kip, 26 N. J. L. [2 Dutch.] 351, 360; Gratz *v.* Beates, 45 Pa. St. 495; Dawson *v.* Mills, 32 Pa. St. 302), except in the cases where actual location affects title (paragraph 11).

4. In all these cases the declarations are received as in the nature of a part of the *res gestæ* of the continuous and pervading fact of possession or claim, and hence are admissible not only against, but equally in favor of, the declarant and those claiming under him. Sheaffer *v.* Eakeman, 56 Pa. St. 144, page 461 of this vol.

5. If possession with or without apparent paper title has been

of title, made by the grantor while owner of the land, cannot be impeached by his later and contradictory statements made after he parted with the title.[92]

Admission as to title are dangerous evidence.[93]

shown to have been in a person under whom either party claims, evidence of his declarations and admissions against his interest, of facts such as oral evidence is competent to show, and which directly disparage his title or the extent or the effect of his possession, is admissible against those claiming under him, if clearly shown to have been made while he held the possession and the title, if any. Page 461 of this vol.; Outcalt *v.* Ludlow, 32 N. J. L. 239; Carpenter *v.* Carpenter, 8 Bush (Ky.), 283; Eckford *v.* De Kay, 8 Paige, 89; Keator *v.* Dimmick, 46 Barb. 158; Graham *v.* Busby, 34 Miss. 272, 274; Jackson *v.* Livingston, 7 Wend. 136; Corbin *v.* Jackson, 14 Id. 619. Statements of merely incidental facts (such as the amount due on a mortgage, etc.; Cook *v.* Swan, 5 Conn. 140; Foote *v.* Beecher, 7 Abb. New Cas. 358), as well as any declarations made before acquiring (Wallace *v.* Miner, 6 Ohio, 366) or after parting with (Vrooman *v.* King, 36 N. Y. 483) the possession or title, are inadmissible, unless as part of the *res gestæ* of a specific fact already properly in evidence (Moore *v.* Hamilton, 44 N. Y. 666; Kent *v.* Harcourt, 33 Barb. 491; Rigg *v.* Cook, 9 Ill. [4 Gilm.] 336, 350; Bell *v.* Woodward, 46 N. H. 315, 335; Brush *v.* Blanchard, 19 Ill. 31; McDowell *v.* Goldsmith, 6 Md. 319, 338; Dinkle *v.* Marshall, 3 Binn. [Pa.] 587; Carroll *v.* Granite Manuf. Co., 11 Md. 399, 407; Johnson *v.* Elliot, 26 N. H. [6 Fost.] 67, 76; Cheswell *v.* Eastham, 16 N. H. 296), or brought home to the party against whom they are adduced.

6. If one under whom neither party claims is shown to have been in possession, with or without apparent title, and it is a question whether he held under a claim of title and if so what claim, his declarations and admissions made while in possession, and characterizing his claim of title, are competent after his decease, but not before. 2 Whart. Ev., § 1156.

7. In none of these cases are admissions and declarations competent as a substitute for (Maslin *v.* Thomas, 8 Gill. [Md.] 18, 29), or in contradiction of, a paper title.

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[92] Royal *v.* Chandler, 79 Me. 265, 1 Am. St. Rep. 305, 9 Atl. Rep. 615.

[93] Jackson *v.* Shearman, 6 Johns. 19; Jackson *v.* Cary, 16 Id. 302; Jackson *v.* Miller, 6 Cow. 751, affi'd in 6 Wend. 228. Evidence that possession was characterized by declarations claiming it under a writing, does not necessarily require production of the writing. Patterson *v.* Flanagan, 37 Ala. 513, 522, chapter XXXVII, paragraph 1 of this vol.

31. Recitals.

A *recital* in a deed[94] is evidence of the fact or instrument recited, as against the parties to the deed, and those who claim under them by matters subsequent, whether by privity in blood, estate or law;[95] but not against others,[96] unless accompanied with other evidence of the ancient existence of the deed and of possession in accordance with it,[97] in which case it is admissible even against strangers.[98]

A deed, containing a recital, is competent, although it does not directly affect the title.[99] A general recital, as

Gibney *v.* Marchay, 34 N. Y. 301, 304; Jackson *v.* Cole, 4 Cow. 587; Oakes *v.* Marcy, 10 Pick. (Mass.) 195.

8. Declarations, not admissible under these rules, are not rendered admissible by the fact that they are offered to rebut other contrary declarations already in evidence. Waring *v.* Warren, 1 Johns. 340; S. P., Henson *v.* Findlay, 12 Penn. St. 304. Nor even though made as dying declarations. Jackson *v.* Vredenburgh, 1 Johns. 159.

For the application of these rules, on a question of fraud as against creditors, see Chapter LI. For declarations as to advancements, see pages 453–455 of this vol.

[94] A recital in a deed given under a decree, may be limited by the decree. McCall *v.* Carpenter, 18 How. (U. S.) 297.

Recitals in deeds under foreclosure as to regularity of proceedings and sale, are to be deemed as *prima facie* true. Williamson *v.* Mayer, 117 Ala. 253, 23 So. Rep. 3.

It is unnecessary to substantiate those recitals by producing the record, until the presumption has been overcome. Haward *v.* Landsberg, 108 Va. 161, 60 S. E. Rep. 769.

[95] Carver *v.* Astor, 4 Pet. 1, and cases cited; Crane *v.* Morris, 6 Id. 598, 611, STORY, J.; Torrey *v.* Bank of Orleans, 9 Paige, 649, and cases cited; Dunn *v.* Eaton, 92 Tenn. 743, 23 S. W. Rep. 163; Crandall *v.* Lynch, 20 App. Cas. (D. C.) 73; Empire Ranch, etc., Co. *v.* Howell, 22 Colo. A. 389, 125 Pac. Rep. 592.

[96] Hill *v.* Draper, 10 Barb. 454; Hardenburgh *v.* Lakin, 47 N. Y. 109; Swainson *v.* Scott, 111 Tenn. 140, 76 S. W. Rep. 909.

[97] Schermerhorn *v.* Negus, 2 Hill, 335; McKinnon *v.* Bliss, 21 N. Y. 206, affi'g McKineron *v.* Bliss, 31 Barb. 180.

[98] Deery *v.* Cray, 5 Wall. 795, 805; Dougherty *v.* Welshans, 233 Pa. 121, 81 Atl. Rep. 997.

[99] Jackson *v.* Harrington, 9 Cow. 86. But, in such a case, since the claim of the party is not founded on the deed, the deed is not an estoppel (Champlain, &c. R. R. Co. *v.* Valentine, 19 Barb. 484), and the recital must be one which is competent as an admission of a

distinguished from a direct affirmation of fact, is not a conclusive estoppel;[1] and one which would otherwise be conclusive may be explained by mistake,[2] etc., unless acted on, so as to create an equitable estoppel.

32. Estoppels.

A conveyance, which, expressly or by necessary implication, affirms that the grantor is seized of and conveys a fee simple, estops the grantor, and those claiming under him, from denying that he had that estate and passed it by the deed.[3] But a quitclaim, or a deed which does not, on its face, define the estate or interest conveyed or intended to be conveyed in the premises, does not estop either party from showing, in opposition to it, that no title passed, or from claiming after-acquired title.[4] An estoppel against estoppel sets the matter at large.[5]

Evidence of an *equitable estoppel* is admissible under a

predecessor in title or possession, under the rules already stated, and if the instrument containing it was not executed by him there must be evidence of his acceptance or of possession of it on the part of him or of them against whom it is adduced. Jackson *v.* Brooks, 8 Wend. 426. For this purpose their production of it is *prima facie* enough. Jackson *v.* Harrington (above).

[1] Huntington *v.* Havens, 5 Johns. Ch. 23; Dempsey *v.* Tylee, 3 Duer, 73.

Where the recital is specific, giving, for instance, names of parties, dates and other information in detail, the evidential value of the recital is naturally greater and more conclusive; yet, a general recital is such evidence as may, taken in connection with other facts and circumstances, even raise the presumption of a grant. Dougherty *v.* Welshans, 233 Pa. 121, 81 Atl. Rep. 997.

[2] Stoughton *v.* Lynch, 2 Johns. Ch. 209.

[3] Van Rensselaer *v.* Kearney, 11 How. (U. S.) 297; Heath *v.* Crealock, L. R. 10 Chan. App. 22, s. c., 11 Moak's Eng. 416, and cases cited; and see House *v.* McCormick, 57 N. Y. 310; Gallup *v.* Albany Rev., 7 Lans. 471.

[4] Sparrow *v.* Kingman, 1 N. Y. 242, 247; Kingman *v.* Sparrow, 12 Barb. 201; Bigelow *v.* Finch, 11 Barb. 498. The estoppel which passes an after-acquired title, under a prior one, cannot be prejudiced by the admission of the party setting it up, that the grantor had no title when he conveyed. McCusker *v.* McEvey, 9 R. I. 528, s. c., 11 Am. Rep. 295.

[5] Branson *v.* Wirth, 17 Wall. 32.

denial,[6] or by amendment, if the party is not misled.[7] Estoppel *in pais* cannot work a transfer of title to land;[8] but it may cut off a lien,[9] conclude a question of boundary,[10] or even preclude the true owner and those claiming under him from impeaching an adverse conveyance when taken on the faith of his disavowals.[11]

33. Former Adjudication.

A former judgment in ejectment, recovered under the new procedure, is evidence (and conclusive, except where the statute gives a new trial of course), against the parties, as in personal actions.[12] And against strangers who entered

[6] Or under the plea of not guilty. Hagan *v.* Ellis, 39 Fla. 463, 22 So. Rep. 727. See also East *v.* Peden, 108 Ind. 92, 8 N. E. Rep. 722.

[7] Rowan *v.* Kelsey, 4 Abb. Ct. App. Dec. 125.

But the amendment must not introduce a new cause of action. McCandless *v.* Inland Acid Co., 115 Ga. 968, 42 S. E. Rep. 449.

[8] Babcock *v.* Utter, 1 Abb. Ct. App. Dec. 27; Hayes *v.* Livingston, 34 Mich. 384, s. c., 22 Am. Rep. 533; Suttle *v.* Richmond, etc., R. Co., 76 Va. 284.

[9] Markham *v.* O'Connor, 52 Geo. 183, s. c., 21 Am. Rep. 249; Jennings *v.* Brown, 20 Okl. 294, 94 Pac. Rep. 557.

[10] Corkhill *v.* Landers, 44 Barb. 218.

As by acquiescing in the location of a dividing line constructed by one of two abutting owners. Evans *v.* Kunze, 128 Mo. 670, 31 S. W. Rep. 123.

[11] Mattoon *v.* Young, 45 N. Y. 696, again, 2 Hun, 559. For the three propositions on equitable estoppel, see 22 Moak's Eng. 373, and cases collected; id. 375, n.

But in Suttle *v.* Richmond, etc., R. Co., 76 Va. 284, it was held that one who is vested with the legal title to land cannot be divested of it notwithstanding the fact of his disavowals, and parol evidence of his disclaimer was excluded.

To the same effect. Haney *v.* Breeden, 100 Va. 781, 42 S. E. Rep. 916.

But see Jennings *v.* Brown, 20 Okl. 294, 94 Pac. Rep. 557.

[12] Sturdy *v.* Jackaway, 4 Wall. 174; Miles *v.* Caldwell, 2 Id. 35; N. Y. Code Civ. Pro., Sec. 1524; Klick *v.* Gernert, 220 Pa. 503, 69 Atl. Rep. 1034.

In Missouri it is still held that the judgment in one action of ejectment is not a bar to another action in ejectment, though it be between the same parties and in respect to the same title and tract of land. Crowl *v.* Crowl, 195 Mo. 338, 92 S. W. Rep. 809.

In that state the only way of

into possession after the former action was commenced, but not others.[13] The grounds of former judgment, if they do not fully appear from the record, may be shown by parol, provided that the matters alleged to have been passed upon are such as could legally have been given in evidence upon the trial, and that the verdict and judgment show that they must necessarily have been considered by the court and jury.[14] Judgment in summary proceedings,[15] or in a proceeding or action to determine conflicting claims [16] is competent. Acquittal in forcible entry and detainer, is not.[17]

To prove a judgment as an adjudication upon the title, or a link in its chain, the judgment roll must be produced.[18]

preventing a litigious adversary from prosecuting actions *ad infinitum* is by suing a bill of peace. Sutton *v.* Dameron, 100 Mo. 141, L. C. 149.

At common law a judgment in ejectment was never final and either party might bring a new action and the former judgment would not be a bar. By statute in some states the parties have been limited to two actions and the second judgment is a bar to further actions between the same parties involving the same title. Williamson *v.* Mayer, 117 Ala. 253, 23 So. Rep. 3, Code 1886, § 2714; Code 1896, § 1554. See Hyatt *v.* Challiss, 55 Fed. Rep. 267.

[13] Thompson *v.* Clark, 4 Hun, 165. Compare Sheridan *v.* Andrews, 49 N. Y. 479.

[14] Wood *v.* Jackson, 8 Wend. 9, rev'g 3 Id. 27, reviewing conflicting cases. Followed by NELSON, J., Lawrence *v.* Hunt, 10 Id. 81; S. P., Stedman *v.* Patchin, 34 Barb. 218; Miles *v.* Caldwell, 2 Wall. 35. When the record of a judgment in equitable ejectment is general, extrinsic evidence is admissible to prove what particular matters were litigated. German-American Title, &c. Co *v.* Shallcross, 147 Pa. St. 485, 30 Am. St. Rep. 751, 23 Atl. Rep. 770.

A recital in the judgment that the commissioners had complied with the law in posting, mailing and publishing of notices cannot be impeached in a collateral proceeding. Young *v.* People, 171 Ill. 299, 49 N. E. Rep. 503.

[15] Terrett *v.* Cowenhoven, 11 Hun, 320.

[16] Lessees of Parrish *v.* Ferris, 2 Black. 606.

[17] Peyton *v.* Stith, 5 Pet. 485.

[18] Harper *v.* Rowe, Cal. 1878, 7 Reporter, 174, and see Chapter XXIX. All the necessary or proper documents used in summary proceedings in a matter pending before a court of record, although not proceeding according to the course of the common law in that particular matter, unless otherwise declared by law, are competent and material

34. Defendant's Possession; Ouster.

The fact that defendant was in possession at the commencement of the action must be shown.[19] It may be proved by direct testimony;[20] or by declarations of the defendant;[21] or by his acts of dominion;[22] or by the fact that he procured himself to be made a party, in order to defend the title.[23] A variance as to his claim of title,[24] or the relative possession of several defendants,[25] is not fatal.

Proof of lease or entry is no longer required,[26] nor of ouster unless it is shown that defendant is a tenant in common or joint tenant with plaintiff, or holds under such a co-tenant of plaintiff.[27] In that case actual ouster is gen-

to sustain the adjudication. Embury *v.* Conner, 3 N. Y. 511, rev'g 2 Sandf. 98.

Where the nature of the controversy in the former suit appears on the face of the proceedings in that suit, the mere production of the record will suffice to establish the plea of *res adjudicata*. Harris *v.* Mason, 120 Tenn. 668, 115 S. W. Rep. 1146, 25 L. R. A. N. S. 1011.

[19] Abbey Homestead Assoc. *v.* Willard, 48 Cal. 614; Haden *v.* Goodwin, 217 Mo. 662, 117 S. W. Rep. 1129.

[20] Van Rensselaer *v.* Vickery, 3 Lans. 57.

Where the land in dispute was a strip of land 6 feet wide, on which a water ditch was located and the evidence merely showed that defendants, who had denied ouster and possession, frequently placed a pressure board in the ditch, thus cutting off and diverting plaintiff's water, it was held that such evidence established a mere trespass and did not warrant a judgment for plaintiff. Tibbets *v.* Bakewell, 4 Cal. Unrep. Cas. 477, 35 Pac. Rep. 1107.

[21] See paragraph 31.

By denying plaintiff's title and pleading sole seizin, defendant admits a demand and ouster. Aiken *v.* Lyon, 127 N. C. 171, 37 S. E. Rep. 199.

[22] Such as residence on the premises, or receipt of rents, or cutting down trees, and the like, or refusal of a demand for possession. Tyl. Ej. 473.

[23] Jackson *v.* Harrow, 11 Johns. 434; Den dem. Mordecai *v.* Oliver, 5 Hawks (N. C.), 479; Kreamer *v.* Voneida, 213 Pa. 74, 62 Atl. Rep. 518.

[24] Rose *v.* Bell, 38 Barb. 25.

[25] Fosgate *v.* Herkimer Mfg. & Hydraulic Co., 12 N. Y. 580, affi'g 12 Barb. 352.

[26] 2 N. Y. R. S. 306, §§ 26, 27. Now covered by Code Civ. Pro., Chapter XIV.

[27] Gillet *v.* Stanley, 1 Hill, 121; Sharp *v.* Ingraham, 4 Id. 116.

The acquisition of a tax deed by

erally necessary.[28] It may be proved by showing that the defendant held adversely, or that he denied the title of the other co-tenants, or claimed the whole of the premises for himself, or denied possession to the other; or had the sole and undisturbed possession for a long course of years without payment of rent, and without any claim of any part of the profits by the other co-tenants during the whole of the time.[29] Presumption of ouster does not arise where the right exercised by the tenant in possession is consistent with the rights of his co-tenant.[30]

35. Mesne Profits.

Rents and profits cannot be recovered unless claimed in the complaint.[31] When the holding by the defendant is found to be unlawful as against plaintiff, nominal damages may be recovered by the latter without other proof than of the unlawful retention of the possession. Such damages

a tenant in common, claim made thereunder and an admission by the tenant in possession that she held in subordination to the tax title, constitute sufficient evidence of ouster of another cotenant to support ejectment. Dahlem *v.* Abbott, 153 Mich. 465, 116 N. W. Rep. 1007.

[28] Sharp *v.* Ingraham (above); Tyl. Ej. 199.

[29] Tyl. Ej. 476; Carpenter *v.* Carpenter, 119 Mich. 167, 77 N. W. Rep. 703.

[30] Butler *v.* Phelps, 17 Wend. 642. Compare Gregg *v.* Sayre, 8 Pet. 244; Clason *v.* Rankin, 1 Duer, 337.

"This firmly settled, by repeated decisions on our part but a permissive possession, whether expressly so or one arising by implication in the case of a mistaken holding by an adjoining owner, without any intention of claiming beyond the true line, is presumed to continue to be of the same character, until notice is brought home to the holder of the true title of the change of the permissive possession into one hostile and adverse." Lecroix *v.* Malone, 157 Ala. 434, 47 So. Rep. 725.

[31] Larned *v.* Hudson, 57 N. Y. 151. As to damages, see Vandevoort *v.* Gould, 36 N. Y. 639.

"Damages and mesne profits are generally made by statute part of the recovery in the ejectment suit." Sedgwick & Wait on Trial of Title to Land, § 61.

Where they are recovered, any taxes paid by defendant should be credited to him. Nunn *v.* Lynch, 89 Ark. 41, 115 S. W. Rep. 926, 16 Ann. Cas. 852.

are given to vindicate the valid right of the plaintiff to the possession.[32] The claim is open to every equitable defense.[33]

36. Defenses.

Defendant need not show title in himself, but may rest on showing title out of plaintiff,[34] and even a mere possessor, without claim of title, may give evidence tending to raise a presumption that the title under which the plaintiff claims is extinct.[35] If plaintiff has only shown a possessory title, it is enough for defendant to show a prior possession within the period fixed by the statutes of limitations. Under the new procedure, an equitable defense may be proved.[36] Under a general denial, defendant may controvert any fact which plaintiff is bound to establish to make out title and right of possession at the commencement of the action;[37]

[32] Hahn *v.* Cotton, 136 Mo. 216, 226, 37 S. W. Rep. 919; Cotterhill *v.* Hobby (1825), 4 B. & C. 465.

[33] Jackson *v.* Loomis, 4 Cow. 168.

[34] See paragraphs 1 *et seq.* But to defeat an action of ejectment by an outstanding title in a stranger, the defendant must show it to be a present, subsisting, operative legal title, under which the owner could recover if asserting it in an action. It is not for the plaintiff to disprove its validity. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. Rep. 255.

A defendant who is not a mere trespasser or interloper may show an outstanding and subsisting title in a stranger to defeat the plaintiff's right of recovery. McGuire *v.* Blount, 199 U. S. 142, 26 Sup. Ct. 1, 50 L. ed. 125.

If the plaintiff establishes an interest in a title to the land superior to that of the defendant the latter cannot avail himself of an outstanding title in a third person although it be superior to that of the plaintiff. McBride *v.* Steinweden, 72 Kan. 508, 83 Pac. Rep. 822; Thomas *v.* Rauer, 62 Kan. 568, 64 Pac. Rep. 80.

[35] Tyl. Ej. 564. Compare Greenleaf *v.* Birth, 6 Pet. 302; Foster *v.* Joice, 3 Wash. C. Ct. 498.

[36] Crary *v.* Goodman, 12 N. Y. 266. See paragraph 29.

[37] In a common-law action of ejectment, the only appropriate pleading is "not guilty," since under it anything in bar of the action may be offered in evidence. Smith *v.* Cox, 115 Ala. 503, 22 So. Rep. 78. The defendant is never required to plead specific defenses to a title which the plaintiff does not disclose in his complaint and of which the defendant may be ignorant, but when that title is presented by the proof he may introduce under his general

but he cannot prove a discharge of a cause of action then existing in plaintiff against him.[38]

37. — Adverse Possession.

The burden of proving adverse possession is upon the party who asserts title based thereon against the holder of the legal title.[39] Such possession must be shown to have been based on a claim of title. Oral claim without written foundation is not enough, except as to land of which actual occupation is shown.[40] The possession must be shown to have been open, visible, notorious, exclusive, and adverse to plaintiff's title.[41] It must be such that owner may be

denial any evidence that will defeat it. Henderson *v.* Wanamaker, 49 U. S. App. 174, 79 Fed. Rep. 736.

In some states by statute, all defenses, legal and equitable, may be proved and given in evidence under a general denial. Hurst *v.* Sawyer, 2 Okla. 470, 37 Pac. Rep. 817, and cases cited.

See also Chicago, etc., R. Co. *v.* Welch, 83 Nebr. 106, 118 N. W. Rep. 1116.

In an action of ejectment a defense of right of way by prescription, or by necessity, or that the land in question is a public highway is, like adverse possession, an affirmative defense, and must be set forth in the answer. Burlew *v.* Hunter, 41 App. Div. 148, 58 N. Y. Supp. 453.

[38] Raynor *v.* Timerson, 46 Barb. 518. But compare Ford *v.* Sampson, 8 Abb. Pr. 332, s. c., 30 Barb. 183, 17 How. Pr. 447.

[39] McConnell *v.* Day, 61 Ark. 464, 33 S. W. Rep. 731.

A mere naked possession without a claim of title or right does not constitute adverse possession. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. Rep. 255.

If one has a writing giving color of title his possession ordinarily goes to the extent of the boundaries specified in such writing. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470, 27 S. E. Rep. 255.

[40] The requisites of the claim and of the possession are prescribed by statute. See Tyl. Ej. 859, &c.

The fact that the claimant to land by adverse possession has made improvements on the lot in good faith, believing he had the right to the possession of the same, does not in itself suffice to give color of title. W. O. Whitney Lumber, etc., Co. *v.* Crabtree, 166 Fed. Rep. 738, 92 C. C. A. 400.

[41] Evidence is admissible to show the the use of the land by other persons had been with the consent

presumed to know that there is possession adverse to his title; though actual knowledge in not necessary.[42] It is not made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to title of true owner.[43] The rule that a state of facts proved to exist is presumed to continue, in the absence of evidence to the contrary, does not apply to proof of possession under the statute of limitations, but continuous actual possession for the prescribed period must be proved.[44]

Ripe adverse possession, being shown, is not rebutted by

of the party and therefore did not interrupt his adverse holding. Tome Institute *v.* Crathers, 87 Md. 569, 40 Atl. Rep. 261.

One who relies on adverse possession must prove all the elements of the doctrine. Parkersburg Industrial Co. *v.* Schultz, 43 W. Va. 470 and cases cited, 27 S. E. Rep. 255.

Mere possession, no matter how long continued, do not create title by limitation. Crowl *v.* Crowl, 195 Mo. 338, 92 S. W. Rep. 890.

Possession, in order to be adverse, must operate to disseize or oust another person of his possession or right thereto. Lecroix *v.* Malone, 157 Ala. 434, 47 So. Rep. 725.

By the weight of authority, possession through misapprehension or mistake is not adverse possession. Where the intention of the party who has possession is material to the issue, his admissions are admissible together with other evidence tending to show such intention. Schaubuch *v.* Dillemuth, 108 Va. 86, 60 S. E. Rep. 745, 15 Ann. Cas. 825.

Mere cutting of timber off the land to make boards and troughs is not enough to establish adverse possession especially where it appears that all the trees cut during those years did not exceed five or six. Robinson *v.* Claggett, 149 Mo. 153, 50 S. W. Rep. 280.

Testimony that during a certain period it was generally known in the vicinity of the land in dispute that defendant in ejectment claimed title to it, is competent to show notoriety of his claim, but not to show his title. Doe *v.* Edmondson, 145 Ala. 557, 40 So. Rep. 505.

[42] 2 Greenl. Ev., § 430. Mere possession does not give title by adverse possession. Coquille Mill, etc., Co. *v.* Johnson, 52 Or. 547, 98 Pac. Rep. 132, 132 Am. St. Rep. 716.

[43] 2 Greenl. Ev. 394, note 5; Dallam *v.* Sanchez, 56 Fla. 779, 47 So. Rep. 871; Lecroix *v.* Malone, 157 Ala. 434, 47 So. Rep. 725.

[44] Woods *v.* Hull, 90 Tex. 228, 38 S. W. Rep. 165. But see N. Y. Central, etc., R. Co. *v.* Moore, 137 App. Div. 461, 121 N. Y. Supp. 884.

a subsequent admission of not having title;[45] but oral admissions, though to a stranger, are competent to show an agreement to hold under the true owner.[46] Evidence of the manner of occupation and of the conduct of others, tending to negative the idea of a subordinate possession, is competent.[47] Evidence to prove adverse possession is admissible under a general denial of plaintiff's title.[48]

The assessment of taxes to a person in possession, and the payment of the tax by him, are admissible to show that his possession is adverse.[49]

But where a person is not in actual occupation or possession, payment of taxes is not, in and of itself, evidence of adverse possession.[50]

[45] Stuyvesant *v.* Tompkins, 9 Johns. 61, affi'd in 11 Id. 569.

[46] Read *v.* Thompson, 5 Penn. St. 327; Moore *v.* Small, 9 Id. 194.

An admission of a better outstanding title may be inferred from the abandonment of the premises, even where the party abandoning the same has held adversely for seven years, the period required by statute to give title by adverse possession. Williamson *v.* Mosley, 110 Ga. 53, 35 S. E. Rep. 301.

[47] Fellows *v.* Fellows, 37 N. H. 75, 86.

[48] Oldig *v.* Fisk, 53 Neb. 156, 73 N. W. Rep. 661; Fink *v.* Dawson, 52 Neb. 647, 72 N. W. Rep. 1037. Proof of title acquired by adverse possession under color of title is admissible under an allegation of ownership in fee, in an action to quiet title. Rogers *v.* Miller, 13 Wash. 82, 42 Pac. Rep. 525.

But see Guerard *v.* Jenkins, 80 S. C. 223, 61 S. E. Rep. 258, as to necessity of pleading the statute of limitations as a defense.

[49] Elwell *v.* Hinckley, 138 Mass. 225; Metz *v.* Metz, 48 S. C. 472, 26 S. E. Rep. 787; Faulcon *v.* Johnston, 102 N. C. 264, 11 Am. St. Rep. 737, 9 S. E. Rep. 394; Greenleaf *v.* B., F. & C. I. R. Co., 141 N. Y. 395, 399. In has sometimes been regarded as an act which shows a claim of title, but not a claim of possession. Archibald *v.* New York, &c. R. Co., 157 N. Y. 574, 583–584, 52 N. E. Rep. 567.

Tax receipts are inadmissible in evidence where there is no title in defendants under the Limitation Act. The question as to who paid the taxes is immaterial. Kinkade *v.* Gibson, 209 Ill. 246, 70 N. E. Rep. 683.

[50] Little *v.* Megquier, 2 Greenl. 176; Reed *v.* Field, 15 Vt. 672; Paine *v.* Hutchins, 49 Vt. 314, 317; Maglee *v.* Albright, 4 Whart. 291; Cornelius *v.* Giberson, 1 Dutch. 1, 36; Thompson *v.* Burhans, 61 N.

38. Bona Fide Purchaser.

The facts giving the right to protection must be proved; and must be alleged, to be admissible in evidence.[51] Subject to qualifications below stated, applicable where protection depends on the recording act, a party relying on the plea that he is a *bona fide* purchaser, entitled to hold notwithstanding fraud, must prove apparently perfect title to a vested estate, by a regular conveyance.[52] The statement of consideration contained in the deed is not sufficient;[53]

Y. 52; Miller *v.* Long Island Railroad, 71 N. Y. 380; Chapman *v.* Templeton, 53 Mo. 463; Cashman *v.* Cashman, 50 Mo. App. 663; Miller *v.* Davis, 106 Mich. 300; Brown *v.* Rose, 48 Iowa, 231; Sioux City & Iowa Falls Town Lot & Land Co. *v.* Wilson, 50 Iowa, 522; Raymond *v.* Morrison, 59 Iowa, 371; Mallory *v.* Bruden, 86 N. C. 251; Whitman *v.* Shaw, 166 Mass. 451, 461, 44 N. E. Rep. 333.

An adverse holder who abandons the property before the completion of the statutory bar in his favor thereby breaks the continuity of his adverse possession and cannot predicate a continuance of such possession upon the mere fact that taxes have been assessed against him or that he has paid the same. Louisville, etc., R. Co. *v.* Philyaw, 88 Ala. 264, 6 So. Rep. 837.

[51] Young *v.* Schofield, 132 Mo. 650, 34 S. W. Rep. 497.

The plea that one is an innocent purchaser is an affirmative defense and must be supported by affirmative evidence. Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. Rep. 773; Boone *v.* Chiles, 10 Pet. 177, 211. And see Frost *v.* Beekman, 1 Johns. Ch. 288.

[52] Boone *v.* Chiles (above); Life Ins. & Trust Co. *v.* Cutler, 3 Sandf. Ch. 176. But color of title with adverse possession in the grantor is competent. Tompkins *v.* Anthon, 4 Sandf. Ch. 97. In case of purchase under a decree, regularity in the decree need not be shown. Gallatian *v.* Cunningham, 8 Cow. 361.

Where the grantee under a deed conveying the absolute title, conveys it to a third party for value, the latter acquires a complete title as against another vendee of the original grantor, even though the latter had reserved the right to redeem of which the purchaser of the first vendee had no knowledge. Wilson *v.* Parshall, 54 Hun, 637, 7 N. Y. Suppl. 479, aff'g 129 N. Y. 223, 29 N. E. Rep. 297.

If a deed is void a *bona fide* purchaser is not protected; otherwise, if it is merely voidable. Barden *v.* Grace, 167 Ala. 453, 52 S. 425, Ann. Cas. 1912, A. 537 (deed in which no grantee was named); Swanstrom *v.* Day, 46 Misc. 311, 93 N. Y. Suppl. 192, Aff. 101 App. Div. 609, 92 N. Y. Supp. 1147 (deed procured by undue influence).

[53] Bolton *v.* Jacks, 6 Robt. 166,

but actual payment before notice must be shown.[54] An erroneous statement of consideration in the deed does not preclude evidence of the true consideration.[55] The valuable consideration requisite to be proved is of the same character as required in the case of negotiable paper.[56] If

234; Jackson *v.* Cadwell, 1 Cow. 622; Lloyd *v.* Lynch, 28 Penn. St. 419; Seymour *v.* Wilson, 19 N. Y. 417.

While a recital of consideration is not, of itself, sufficient, yet, considering that the character of the proof is not limited to direct evidence, it may become a potent circumstance in connection with others. Davidson *v.* Ryle, 103 Tex. 209, 124 S. W. Rep. 616, 125 S. W. Rep. 881.

[54] Jewett *v.* Palmer, 7 Johns. Ct. 65.

[55] Paragraph 9, and cases cited.

[56] See Pickett *v.* Barron, 29 Barb. 505, and cases cited; De Lancey *v.* Stearns, 66 N. Y. 157.

In the leading case of Ten Eyck *v.* Wiltbeck, 135 N. Y. 40, 31 N. E. Rep. 994, 31 Am. St. Rep. 809 it was held that a nominal money consideration, though actually paid, is not sufficient to constitute the grantee a "purchaser for a valuable consideration" under the recording act, and his deed, though recorded, is ineffective as against a prior unrecorded conveyance of the same property. The court said: ". . . a small sum of money, inserted and paid, perhaps because of a popular belief that some slight money consideration is necessary to render the deed valid, will not, of itself, satisfy the terms of the statute, where it appears upon the face of the conveyance, or by other competent evidence that it was not the actual consideration. . . . If the sum which the seller is willing to take is grossly disproportionate to the value of the thing which is the subject of the negotiations, it is strong proof of a defective title and sufficient to put a prudent man upon inquiry, and if the buyer neglects to diligently prosecute such inquiry, he may not be awarded the standing of a *bona fide* purchaser."

But in another leading case in Missouri, where the controversy was between the vendee under a duly recorded deed and the vendee under a prior unrecorded deed from the same vendor, the court stated the rule in that state to be that the consideration in the latter is sufficient if it is "such as the law denominates a valuable consideration as distinguished from a good consideration," and that in the absence of fraud, a want of consideration cannot be shown against a recital of a consideration, (though only of $5) for the purpose of defeating the operative words of the deed. Strong *v.* Whybark, 204 Mo. 341, 102 S. W. Rep. 968, 120 Am. St. Rep. 710, 12 L. R. A. N. S. 240.

protection is claimed under a conveyance by way of security for a past indebtedness, an agreement for forbearance will not be presumed in support of the claim, but must be proved,[57] A release or quitclaim, if available at all for the purpose.[58] especially requires extrinsic evidence of consideration.[59] Want of notice must be proved and must be alleged, or is not admissible.[60] Under an allegation relating to the principal, notice to his agent may be proved.[61] Allegation of want of notice on the part of one owner does not admit evidence of want of notice on the part of another.[62] Unless otherwise provided by statute, actual knowledge of an

[57] Cary *v.* White, 52 N. Y. 138.

In De Lancey *v.* Stearns, 66 N. Y. 157, 161, Judge Rapallo said:

"It has been held in numerous cases that one who, without notice of a prior unrecorded mortgage, takes a conveyance of land in payment of an existing debt or as security therefor, without giving up any security, divesting himself of any rights, or doing any act to his own prejudice on the faith of the title, before he has notice of the mortgage, is not a *bona fide* purchaser."

See also Howells *v.* Hettrick, 160 N. Y. 308, 54 N. E. Rep. 677.

[58] May *v.* Le Claire, 11 Wall. 217.

[59] Boone *v.* Chiles, 10 Pet. 177, 212.

Mere recitals of consideration are not enough. Minneapolis, etc., Ry. Co. *v.* Chicago, etc., Ry. Co., 116 Iowa, 681, 88 N. W. Rep. 1082.

[60] Atty. Gen. *v.* Biphosphated Guano Co., 27 Weekly R. 621; Gallatian *v.* Cunningham, 8 Cow. 361; Balcom *v.* N. Y. Life Ins. & Trust Co., 11 Paige, 454; Boone *v.* Chiles (above).

The burden of proof is upon the party who alleges want of notice. Dundee Realty Co. *v.* Leavitt, 87 Neb. 711, 127 N. W. Rep. 1057, 30 L. R. A. N. S. 389.

On the question of good faith and want of notice, evidence of what the alleged *bona fide* purchaser did after the conveyance to him is inadmissible, as not bearing on the issues. Davidson *v.* Ryle, 103 Tex. 209, 124 S. W. Rep. 616, 125 S. W. Rep. 881.

[61] Griffith *v.* Griffith, Hoff. Ch. 153.

But in order to bind the principal the notice of the agent must be within the scope of the agency. Thus where a person is merely authorized by the purchaser to deliver a check upon the delivery of the deed, notice to him of an outstanding unrecorded deed is not chargeable to the purchaser under the doctrine of agency. Lowden *v.* Wilson, 233 Ill. 340, 84 N. E. Rep. 245.

[62] Atty-Gen. *v.* Biphosphated Guano Co. (above).

existing instrument is, in legal effect, the equivalent to notice by its record.[63] A purchaser who had knowledge of a fact sufficient to put him to inquiry, is presumed to have made inquiry, and is chargeable with notice of whatever it appears he could have ascertained by the inquiry upon which the circumstances should have put him.[64] This presumption may be rebutted by evidence that he made due inquiry, and failed to ascertain the fact.[65]

For the purpose of proving the grantee a *bona fide* purchaser within the meaning of the recording acts, the acknowledgment in the deed is *prima facie* evidence that the consideration, acknowledged to be paid, was paid.[66]

As between one claiming record title, and one claiming under a prior equity or unrecorded instrument, the burden is on the latter to show actual notice to the subsequent purchaser of his rights, or prove circumstances such as would put a prudent man upon his guard and from which actual notice may be inferred.[67] Actual, open and visible possession, inconsistent with the title of the apparent owner

[63] Patterson *v.* De La Ronde, 8 Wall. 292; Crane *v.* Turner, 67 N. Y. 437, affi'g 7 Hun, 357.

[64] Reed *v.* Gannon, 50 N. Y. 345, rev'g 3 Daly, 414; Cordova *v.* Hood, 17 Wall. 1. And see Maxfield *v.* Burton, L. R. 17 Eq. 15, s. c., 7 Moak's Eng. 642. But compare Wilson *v.* Wall, 6 Wall. 83, 91; Acer *v.* Westcott, 46 N. Y. 384, rev'g 1 Lans. 193.

The communication to the purchaser of a "rumor" that title was "bad," unaccompanied by other evidence, does not constitute such knowledge as to put him upon inquiry. Williams *v.* Smith, 128 Ga. 306, 57 S. E. Rep. 801.

The New York Court of Appeals expressed the rule as to the necessity of inquiry in the following language: "If the facts within the knowledge of the purchaser are of such a nature as, in reason, to put him upon inquiry, and to excite the suspicion of an ordinarily prudent person and he fails to make some investigation, he will be chargeable with that knowledge which a reasonable inquiry, as suggested by the facts, would have revealed." Anderson *v* Blood, 152 N. Y. 285, 46 N. E. Rep. 493, 57 Am. St. Rep. 515.

[65] Reed *v.* Gannon (above).

[66] See paragraph 9. Doody *v.* Hollwedel, 22 N. Y. App. Div. 456, 48 N. Y. Supp. 93.

[67] Brown *v.* Volkening, 64 N. Y. 76; People *v.* Woodruff, 75 N. Y. App. Div. 90, 77 N. Y. Supp. 722.

by the record, is evidence of notice;[68] not so of occupation which is equivocal, occasional, or for a special or temporary purpose. Constructive possession will not suffice.[69]

Conveyance taken for value and without notice may be presumed to have been taken in good faith, in the absence of other evidence.[70]

Record of an instrument within the purview of the statute,[71] and duly authenticated so as to be entitled to record, is, as the recording acts are usually framed, effectual notice, irrespective of omissions in spreading it upon the record,[72] or its omission from the index,[73] or the subsequent destruction of the record;[74] and is conclusive evidence of notice of the instrument from the time of such record, but is not necessarily notice of collateral facts stated in the instrument.[75]

[68] Raynor *v.* Timerson, 54 N. Y. 639.

The possession of the grantee of an unrecorded deed is notice of his title to subsequent purchasers from the same grantor. The burden of proof is upon such purchaser to show want of notice. Beattie *v.* Crewdson, 124 Cal. 577, 57 Pac. Rep. 463; Dundee Realty Co. *v.* Leavitt, 87 Neb. 711, 127 N. W. Rep. 1057, 30 L. R. A. N. S. 389.

It has been so held even where the grantee of the unrecorded deed was not in actual possession but was using the land for grazing purposes, had a fire guard around the premises, and a fence on the north line. McParland *v.* Peters, 87 Neb. 829, 128 N. W. Rep. 523.

But where the unrecorded deed is from a husband to his wife her joint occupation with her husband is not notice of her title. Langley *v.* Pulliam, 162 Ala. 142, 50 So. Rep. 365.

[69] Brown *v.* Volkening, 64 N. Y. 76; Holland *v.* Brown, 140 N. Y. 344, 35 N. E. Rep. 577.

[70] See Franklin *v.* Osgood, 14 Johns. 527; New Orleans Canal and Banking Co. *v.* Montgomery, 95 U. S. (5 Otto) 16; Anthony *v.* Wheeler, 130 Ill. 128, 22 N. E. Rep. 494, 17 Am. St. Rep. 281.

And the burden of proof is upon the former grantee to show that the subsequent purchase was not *bona fide*. Such proof must be clear and positive that the purchase was in bad faith. Lowden *v.* Wilson, 233 Ill. 340, 80 N. E. Rep. 245.

[71] Otherwise of instruments not authorized to be recorded. Boyd *v.* Schlesinger, 59 N. Y. 301; Washburne *v.* Burnham, 63 N. Y. 132.

[72] Riggs *v.* Boylan, 4 Biss. 445.

[73] Mutual Life Ins. Co. *v.* Dake, 1 Abb. New Cas. 381.

[74] Shannon *v.* Hall, 72 Ill. 354, s. c., 22 Am. Rep. 146.

[75] Murray *v.* Ballou, 1 Johns. Ch.

Evidence that a party actually saw, or had information of an instrument upon the record, is notice of it to him, although it was not legally entitled to record.[76]

The pendency of an action (without notice of *lis pendens* filed under the statute), is notice only during its pendency,[77] and of the right established by the decree finally made; not of collateral matters stated in the proceedings.[78]

II. ACTIONS TO DETERMINE CONFLICTING CLAIMS

39. Mode of Proof.

Plaintiff must show, by direct evidence,[79] an actual possession [80] existing for the statute period,[81] and continuing up to the time of commencing the action,[82] under a claim of

566; Crofut *v.* Wood, 3 Hun, 571; Mills *v.* Smith, 8 Wall. 27.

[76] Cramer *v.* Lepper, 26 Ohio St. 59, s. c., 20 Am. Rep. 756.

But the recording of a defectively executed deed is not constructive notice of its contents. Kendrick *v.* Colyar, 143 Ala. 597, 42 So. Rep. 110.

[77] Leitch *v.* Wells, 48 N. Y. 585.

Notice by *lis pendens* is equivalent to actual notice and a purchaser of the property against which it is filed takes subject to equities. Ætna Life Ins. Co. *v.* Stryker, 38 Ind. App. 312, 73 N. E. Rep. 953, 76 N. E. Rep. 822, 78 N. E. Rep. 245; Bryant *v.* Allen, 54 N. Y. App. Div. 500, 67 N. Y. Supp. 89.

Where the same property has been the subject of litigation several times and the person in possession has been evicted, and it appears that they are matters of common knowledge in the community, they are admissible in evidence as tending to show that a purchaser of the land was not a *bona fide* purchaser. Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. Rep. 773.

[78] Paige *v.* Waring, 14 N. Y. Weekly Dig. 524.

[79] The presumption that possession existing at an earlier time continued, is not sufficient. Cleveland *v.* Crawford, 7 Hun, 616.

[80] Churchill *v.* Onderdonk, 59 N. Y. 134. The constructive possession which follows seizin in law, is not enough. Id. Simmons *v.* Carlton, 44 Fla. 719, 33 So. Rep. 408; Thompson *v.* Etowah Iron Co., 91 Ga. 538, 17 S. E. Rep. 663.

[81] One year by N. Y. Code Civ. Pro., § 1638.

[82] Boylston *v.* Wheeler, 61 N. Y. 521; Haynes *v.* Onderdonk, 2 Hun, 619, s. c., 5 Supm. Ct. (T. & C.) 176; Brooks *v.* Calderwood, 34 Cal. 563.

title,[83] such as is specified by the statute;[84] and this makes a *prima facie* case, and compels defendants to show their title,[85] unless their answer disavows claim,[86] in which case plaintiff must prove the fact of their claim.[87]

If plaintiff's possession is under an unfounded claim, it is enough for defendant to show a prior possession.[88]

Title, claim of title and possession may be proved in the same manner as in ejectment.

III. ACTIONS TO REMOVE CLOUD ON TITLE

40. Mode of Proof.

Plaintiff's title, if in issue, must be proved.[89]

As to defendant's claim, evidence which would be appropriate to sustain ejectment,[90] or an action for the determination of conflicting claims,[91] is not enough. Plaintiff must show that the claim or lien[92] which he seeks to remove,[93]

[83] Mere possession is not enough. Stark *v.* Starrs, 6 Wall. 402. But possession under a void deed is. Ford *v.* Belmont, 69 N. Y. 567, 570, affi'g 35 Super. Ct. (J. & S.) 135; Schroeder *v.* Gurney, 10 Hun, 413. Though questions of title cannot be tried in forcible entry and detainer proceedings, yet the plaintiff's deeds are admissible in evidence to show that the property was conveyed to him by a holder in possession. Muller *v.* Balke, 167 Ill. 150, 47 N. E. Rep. 355.

[84] N. Y. Code Civ. Pro., § 1638.

[85] Ford *v.* Belmont (above); Stackhouse *v.* Stotenbur, 22 N. Y. App. Div. 312.

[86] Boylston *v.* Wheeler, 5 Supm. Ct. (T. & C.) 179, s. c., 2 Hun, 622.

[87] Davis *v.* Read, 65 N. Y. 566.

[88] Ford *v.* Belmont (above).

[89] Wing *v.* Sherrer, 77 Ill. 200. For the mode of proof, see the previous paragraphs of this chapter.

[90] Bockes *v.* Lansing, 13 Hun, 38, affi'd 74 N. Y. 437.

[91] Bailey *v.* Briggs, 56 N. Y. 407.

[92] It is not essential, however, that the claim or lien be wholly of record. Fonda *v.* Sage, 48 N. Y. 173.

A mortgage which appears to be valid upon its face and which requires extrinsic evidence to show its invalidity, constitutes a cloud upon the title. Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 45 N. Y. Supp. 21.

Thus relief has been granted where it appeared that the mortgage had been paid. McArthur *v.* Griffith, 147 N. C. 545, 61 S. E. Rep. 519.

[93] Or to prevent. Crook *v.*

purports to affect injuriously [94] his real estate,[95] and appears on its face to be valid, and that the defect in it, on which he relies [96] to show its invalidity, can be made to appear only by extrinsic evidence,[97] and will not necessarily appear in pro-

Andrews, 40 N. Y. 547, 551; N. Y. & H. R. R. Co. *v.* Trustees of Morrisania, 7 Hun, 652. If the action is to prevent the creating of cloud, he must show that there is a determination on defendant's part to create it. Danger that it may be created is not enough. Sanders *v.* Village of Yonkers, 63 N. Y. 489, 492.

[94] Hartman *v.* Reed, 50 Cal. 485.

Plaintiff should affirmatively show: "(1) that he cannot immediately or effectually maintain or protect his rights by any other course of proceedings open to him; (2) that the instrument sought to be cancelled is such as would operate to throw a cloud or suspicion upon his title, and might be vexatiously or injuriously used against him; and (3) that he either suffers some present injury by reason of a hostile claim of right, or, though such claim be not asserted adversely or aggressively, he has reason to apprehend that the evidence upon which he relies to impeach or invalidate the same as a cloud upon his title may be lost or impaired by lapse of time." Thompson *v.* Etowah Iron Co., 91 Ga. 538, 17 S. E. Rep. 663.

[95] Smith *v.* Mayor, &c. of N. Y., 68 N. Y. 552. As to leasehold, see Hebrew Free School Assoc. *v.* Mayor, &c. of N. Y., 4 Hun, 446.

[96] If a ground of invalidity which would not appear in the record of the claim or lien is proved, the relief may be granted although another ground of invalidity exists which would appear by the record. Boyle *v.* City of Brooklyn, 71 N. Y. 1, rev'g 8 Hun, 32.

[97] To illustrate: Absence of evidence of authority of an attorney to convey is an obvious defect, and a claim thus imperfect is not a cloud. Washburne *v.* Burnham, 63 N. Y. 132. And compare chapter XLVIII, paragraph 6 of this vol. But the fact that a deed under which the claim is made was forged, but has nevertheless been proved and recorded, is a defect which must be shown by extrinsic evidence, because the certificates are presumptive evidence of genuineness; and therefore the deed is a cloud. Remington Paper Co. *v.* O'Dougherty, 16 Hun, 594. So of the fact that one claiming to be a *bona fide* purchaser took with notice of a lost deed under which plaintiff claims. Findlay *v.* Hinde, 1 Pet. 241. If the entire evidence is on record as a part of the title, the relief may be refused. Schroeder *v.* Gurney, 73 N. Y. 430, affi'g 10 Hun, 413.

The extrinsic evidence need not rest upon oral testimony. The character of the proof is immaterial. Stokes *v.* Houghton, 16 N. Y. App. Div. 381, 45 N. Y. Supp. 21.

ceedings by the claimant to enforce it.[98] If the objection appears on the face of the instrument or record,[99] or the claimant would necessarily develop it by the proof which he would be obliged to produce,[1] the action is not sustained, unless either the common law or a statutory presumption of the regularity of official acts would avail to make the claim presumptively valid.[2] When the necessary extrinsic evidence is wholly oral, the ground of relief becomes the stronger.[3]

IV. ACTIONS OF FORECLOSURE

41. Foreclosure of Vendor's Lien.

The law implies the lien against the purchaser, and against subsequent purchasers and incumbrancers, if they had notice, or if they took without consideration or assumption of liability. A recital in the deed, of a consideration to be paid at a future day, is enough to charge with notice.[4] The burden is on the purchaser to prove a waiver of the lien.[5] Any act which manifests the intent of the vendor, in conveying or in subsequently dealing with the claim, to waive or abandon the lien, is competent. Taking a personal obligation, payable to the vendor made by the purchaser alone, is no evidence of waiver.[6] Taking other security is not conclusive evidence of waiver, but throws the burden on the vendor to prove clearly

[98] The leading recent expositions of the general rule are: Marsh *v.* City of Brooklyn, 59 N. Y. 280, rev'g 2 Hun, 142, s. c., 4 Supm. Ct. (T. & C.) 413; and Guest *v.* City of Brooklyn, 69 N. Y. 506, affi'g 8 Hun, 97.

[99] Hannewinkle *v.* Georgetown, 15 Wall. 547.

A tax deed conveying "one-vigintillionth" part of a lot is not a cloud on title. Petty *v.* Beers, 224 Ill. 129, 79 N. E. Rep. 704.

[1] Guest *v.* City of Brooklyn (above); Howell *v.* City of Buffalo, 2 Abb. Ct. App. Dec. 412.

[2] Mayor, &c. of N. Y. *v.* North Shore, &c. Ferry Co., 9 Hun, 620.

[3] Marsh *v.* City of Brooklyn (above).

[4] Cordova *v.* Hood, 17 Wall. 1, 5; Montgomery *v.* Keppell, 75 Cal. 128, 19 Pac. Rep. 178, 7 Am. St. Rep. 125.

[5] Garson *v.* Green, 1 Johns. Ch. 308.

[6] Cordova *v.* Hood, 17 Wall 1, 6, and cases cited.

that there was no intention to waive.[7] Plaintiff suing to foreclose his lien before conveyance, need not prove tender of a deed.[8]

42. Foreclosure of Mortgage.

A real estate mortagage duly witnessed and acknowledged is of itself *prima facie* evidence that the mortagagor signed the mortagage.[9] The bond or note, if any, must be produced and proved, or be accounted for and secondary evidence given,[10] for this is the primary evidence of the debt.[11] The recital in the mortgage of the existence of the bond or note, is secondary evidence of that fact,[12] but not con-

[7] Auburn *v.* Settle, 3 Supm. Ct. (T. & C.) 258, 42 Miss. 792, s. c., 2 Am. Rep. 669.

[8] Freeson *v.* Bissell, 63 N. Y. 168. Otherwise if neither party holds the legal title. Thomson *v.* Smith, 63 N. Y. 301.

[9] Greeley State Bank *v.* Line, 50 Neb. 434, 69 N. W. Rep. 966.

But where the execution of both the alleged bond and mortgage is denied under oath, the burden is on the plaintiff to prove the execution. Damman *v.* Vollenweider, 126 Iowa, 327, 101 N. W. Rep. 1130.

[10] Chewning *v.* Procter, 2 M'Cord, 11. The mode of proving execution has been already stated. Chapter XXVII and chapter XLVIII, paragraph 4 of this vol. As to mortgage by religious corporation, see Moore *v.* Rector, &c. of St. Thomas' Church, 4 Abb. New Cas. 51, and cases cited. As to assent of stockholders when required on a corporate mortgage, see Greenpoint Sugar Co. *v.* Whitin, 69 N. Y. 328, affi'g 7 Hun, 44. Plaintiff may prove that a deed, absolute in terms, was in fact a mortgage. Hughes *v.* Edwards, 9 Wheat. 489, 494, and see paragraphs 44 and 45 of this chapter. The burden is on him to show that the deed was taken for his benefit and as security. Fullerton *v.* McCurdy, 55 N. Y. 637; Moffitt *v.* Maness, 102 N. C. 457, 9 S. E. Rep. 399.

[11] Jackson *v.* Blodgett, 5 Cow. 202, 206, and see Langdon *v.* Buel, 9 Wend. 80, 83.

But see Brownell *v.* Oviatt, 215 Pa. St. 514, 64 Atl. Rep. 670, holding that a mortgage may be introduced without the accompanying bond, there being a presumption that the bond has not been discharged.

[12] See Cooper *v.* Newland, 17 Abb. Pr. 343. In an action to foreclose a mortgage, it was held that the agreement to procure the transfer of the policy of insurance was a collateral contract, independent of and distinct from the covenant to insure contained

clusive.[13] A variance in the date [14] or in the allegation of the obligation or covenant,[15] is not fatal if defendant has not been misled. The bond and mortgage are presumptive evidence of consideration.[16] The law of the place where the contract was made, although without the State, may be proved on a question of usury.[17]

In those jurisdictions where a mortagage collateral to negotiable paper has the advantages resulting from negotiability in the hands of a *bona fide* transferee, such a mort-

in the bond and mortgage, and that, consequently, parol proof of such agreement was admissible. Hutzler *v.* Richter, 13 N. Y. App. Div. 592.

The execution of a separate note or bond by the mortgagor is not essential.

A recital of the indebtedness in the mortgage is sufficient evidence of the debt. O'Connor *v.* Nadel, 117 Ala. 595, 23 So. Rep. 532.

[13] Gaylord *v.* Knapp, 15 Hun, 87. Compare Burger *v.* Hughes, 5 Hun, 180.

An action of foreclosure may be maintained without the production of the bond, where the mortgage contains an acknowledgment of the indebtedness and there is no proof other than a recital in the mortgage that a bond was ever executed. Bennett *v.* Edgar, 46 Misc. 231, 93 N. Y. Supp. 203.

In Munoz *v.* Wilson, 111 N. Y. 295, 18 N. E. Rep. 855, the court stated: "It is only, we think when a bond is shown to have accompanied a mortgage, and contains the only apparent evidence of the debt to which the mortgage is collateral, that it must be produced, or its non-production accounted for on the trial. . . . The reason of the rule wholly fails when there has never been a bond, or when the existence of and liability for the debt secured is proved, by the admissions and covenants contained in the mortgage."

[14] Ontario Bank *v.* Schermerhorn, 10 Paige, 109.

[15] Hadley *v.* Chapin, 11 Paige, 245.

[16] Ambrose *v.* Drew, 139 Cal. 665, 73 Pac. Rep. 543; Russell *v.* Kinney, 1 Sandf. Ch. 34, s. c., 2 N. Y. Leg. Obs. 233, affi'd 2 Sandf. Ch. 81, note. As to estoppel by certificates or representations, see Lee *v.* Monroe, 7 Cranch, 366; and the defense of USURY.

The notes, for which the mortgage was the security, import a consideration on their face and make out a *prima facie* showing of consideration for plaintiff. Chambers *v.* Powell, 39 So. Rep. (Ala.) 918.

[17] Lewis *v.* Ingersoll, 3 Abb. Ct. App. Dec. 55, s. c., 1 Keyes, 347; and see, as to law of place, Dickinson *v.* Edwards, 7 Abb. New Cas. 65, rev'g 2 Abb. New Cas. 300.

gage [18] or deed of trust,[19] held by an assignee before maturity, is presumed to have been taken for value and in good faith.[20]

43. Defendant's Liability, Demand and Default.

A grantee of the premises taking merely subject to the mortgage, as distinguished from one taking subject to the *payment* of the mortgage, cannot be presumed to have assumed to pay the mortgage.[21]

One who has effectually assumed payment in favor of plaintiff,[22] is estopped from questioning the validity of the

[18] Carpenter *v.* Longan, 16 Wall. 271, 273.

[19] New Orleans Canal and Banking Co. *v.* Montgomery, 95 U. S. (5 Otto) 16; Shippen *v.* Whittier, 117 Ill. 282, 7 N. E. Rep. 642, one of the cases holding otherwise.

[20] See chapter on NEGOTIABLE PAPER.

[21] Tillotson *v.* Boyd, 4 Sandf. 516; Binsse *v.* Paige, 1 Abb. Ct. App. Dec. 138; Collins *v.* Rowe, 1 Abb. New Cas. 97; Cashman *v.* Henry, 2 Abb. New Cas. 230, s. c., 75 N. Y. 103. For the presumption as to price, in conveyance subject to mortgage, see Johnson *v.* Zink, 51 N. Y. 333, affi'g 22 Barb. 396.

Whether a grantee takes subject to the mortgage or assumes the debt is a question of fact, sometimes difficult of solution. Grover *v.* Bishop, 138 Mich. 505, 101 N. W. Rep. 627.

Where a deed was made "under and subject to the lien" of the mortgage and further provided as follows: "It is hereby agreed between the parties to this instrument that the said party of the second part accepts the title to the foregoing and described pieces and parcels of land and oil rights, subject to the payment of the mortgages herein mentioned; but does not assume the payment of the various outstanding notes given for the debts secured by said mortgages" the court, giving effect to the clause "under and subject to the payment of" held that there was an assumption of the payment of the mortgage. Blood *v.* Crew Levick Co., 171 Pa. St. 328, 33 Atl. Rep. 344.

[22] The Pennsylvania doctrine requires extrinsic evidence, that a grantee merely "subject to the payment" assumed liability. Thomas *v.* Wiltbank, 8 Reporter, 442.

Where it appears that a grantee of land was to pay the amount of a prior mortgage as part of the purchase price, an assumption of the debt will be implied, even in the absence of express words to that effect in the deed. The fact of the assumption of the mortgage as

mortgage,[23] but not from proving payment.[24] If two persons incumber their several lands by one mortgage, the debt is presumed that of both equally.[25]

Default in payment is sufficiently proved by production and proof of the bond and mortgage, if apparently overdue, even by default under the usual interest clause.[26] Payment of taxes and assessments may be proved by the official receipt. Payment of insurance should be proved by a witness and the receipts for premiums will then be competent but not essential.

On a question of priority of lien,[27] the relative dates of the instruments, and their acknowledgment are relevant but not conclusive.[28] The rule that acceptance of a beneficial instrument will be presumed, does not avail to give it priority, in the absence of evidence that the claimant had notice of its existence, with evidence of such additional circumstances as will afford a reasonable presumption of his acceptance of it.[29] A junior mortgagee who has foreclosed and bought in, is presumed to have bid to the value of the equity of redemption only; and will be deemed to hold subject to the senior mortgage.[30]

part of the consideration may be shown by parol. Brosseau *v.* Lowy, 209 Ill. 405, 70 N. E. Rep. 901.

[23] Hartley *v.* Harrison, 24 N. Y. 170; Smith *v.* Cross, 16 Hun, 487; Alvord *v.* Spring Valley Gold Co., 106 Cal. 547, 40 Pac. Rep. 27.

[24] Hartley *v.* Tatham, 2 Abb. Ct. App. Dec. 333.

[25] Hoyt *v.* Doughty, 4 Sandf. 462.

[26] Sowarby *v.* Russell, 4 Abb. Pr. N. S. 238, s. c., 6 Robt. 322. The deed of the trustee is *prima facie* evidence of default in the payment of the debt secured by the deed of trust. Hume *v.* Hopkins, 140 Mo. 65, 41 S. W. Rep. 784.

Thus, also, notes secured by a mortgage are competent to show that the debt secured by the mortgage was past due and unpaid. Jackson *v.* Tribble, 156 Ala. 480, 47 So. Rep. 310.

[27] As to what claims are within the usual allegation, see Knickerbocker Life Ins. Co. *v.* Nelson, 7 Abb. New Cas. 170, and cases cited, affi'g 13 Hun, 321.

[28] Wyckoff *v.* Remsen, 11 Paige, 564.

[29] Bell *v.* Farmers' Bank of Kentucky, 11 Bush, 34, s. c., 21 Am. Rep. 205; Parmalee *v.* Simpson, 5 Wall. 81, 85.

[30] Mathews *v.* Aiken, 1 N. Y. 595.

44. Defenses.

A material fraudulent alteration of the bond or mortgage by the party is a bar.[31] Failure of title without eviction or disturbance of possession in case of a purchase money mortgage is not a defense,[32] unless fraud or misrepresentation is proved, and to be admissible these must be alleged.[33]

A contemporaneous oral agreement as to time of payment, contradictory to the terms of the mortgage, is not competent.[34] A collateral agreement for the application of a cross indebtedness may be proved,[35] but not so as to vary the contract by parol.[36] Where plaintiff is an assignee, the debtor may prove, in support of an allegation of payment, that he himself furnished the money with which the assignment was procured.[37] Intent to merge may be presumed from the act of the owner of the equity of redemption in taking an

[31] Waring *v.* Smyth, 2 Barb. Ch. 119, 135, and see paragraph 7.

[32] Noonan *v.* Lee, 2 Black. 499; Farnham *v.* Hotchkiss, 2 Abb. Ct. App. Dec. 93; State Mut. Bldg., etc., Ass'n *v.* Batterson, 65 N. J. Eq. 610, 56 Atl. Rep. 703.

[33] Noonan *v.* Lee (above).

The mere circumstance that defendant represented the premises to be free and clear of all incumbrances upon which representation plaintiff acted with the result that he was deceived thereby, will not constitute matter of defense, in the absence of evidence showing that the statement was fraudulently made or that it was the inducement for the purchase. Black *v.* Thompson, 136 Ind. 611, 36 N. E. Rep. 643.

[34] Hunt *v.* Bloomer, 5 Duer, 202. As to oral agreement to vary the consideration or condition, compare Townsend *v.* Empire Stone Dressing Co., 6 Duer, 208; Kimball *v.* Meyers, 21 Mich. 276, s. c., 4 Am. Rep. 487. As to effect of diversion of the proceeds, see Craver *v.* Wilson, 14 Abb. Pr. N. S. 374; Moffitt *v.* Maness, 102 N. C. 457, 9 S. E. Rep. 399 (oral agreement to vary the amount of the obligation.)

[35] Peck *v.* Minot, 3 Abb. Ct. App. Dec. 465; Hartley *v.* Tatham, 2 Abb. Ct. App. Dec. 333.

The mortgagor, in an action to redeem, may set off an incumbrance covenanted against in the deed from the mortgagee against the mortgage debt. Crummett *v.* Littlefield, 98 Me. 317, 56 Atl. Rep. 649.

[36] Forsythe *v.* Kimball, 91 U. S. (1 Otto) 291.

[37] McLemore *v.* Pinkston, 31 Ala. 266; and see chap. I, paragraphs 7 and 17 of this vol. The rules as to proving payment are more fully stated in connection with PAYMENT as a defense.

assignment of the mortgage;[38] but even his declaration that he is absolute owner is not conclusive.[39] The presumption of payment resulting from lapse of time,[40] may be repelled by evidence of part payment, or written acknowledgment, made by the debtor within twenty years, even though made after he had parted with his interest in the property.[41] Where the statute does not thus particular evidence,[42] the presumption may be repelled by circumstances, even against a mortgagee or his assigns in possession.[43]

Unconditional[44] tender by the debtor[45] of the whole debt[46] at a time when the creditor was bound to receive

[38] Gardner *v.* Astor, 3 Johns. Ch. 53; Starr *v.* Ellis, 6 Id. 393.

[39] James *v.* Morey, 2 Cow. 246, 285, 307, 313.

[40] A legal presumption independent of the statute (see PAYMENT as a defense), and fixed by statute at twenty years even in case of a mortgage to secure an unsealed note Heyer *v.* Pruyn, 7 Paige, 465.

A lapse of even less than the statutory period (twenty years) if in connection with other circumstances tending to support the presumption of payment, may be submitted to the jury as a ground from which the fact of payment may be presumed. Brownell *v.* Oviatt, 215 Pa. St. 514, 64 Atl. Rep. 670.

[41] New York Life Ins. & Trust Co. *v.* Covert, 3 Abb. Ct. App. Dec. 350.

[42] Hughes *v.* Edwards, 9 Wheat. 489, 497.

[43] Brobst *v.* Brock, 10 Wall. 519, and cases cited. Where in an action to foreclose a mortgage, which by its terms was given to secure the payment of moneys as specified in the condition of a bond, the defense of payment is interposed, the non-production of the bond by the plaintiff is evidence of the discharge of the mortgage debt; and if unexplained is conclusive against plaintiff's right to recover. Bergen *v.* Urbahn, 83 N. Y. 49.

[44] Storey *v.* Krewson, 55 Ind. 397, s. c., 23 Am. Rep. 668.

[45] Harris *v.* Jex, 66 Barb. 232.

Where the party to whom the money is due refused to accept it, it is not necessary that there be an actual production of the money. Stephenson *v.* Kilpatrick, 166 Mo. 262, 65 S. W. Rep. 773.

[46] Graham *v.* Linden, 50 N. Y. 547.

Though there may not be a full and complete legal tender, yet, if the mortgagee, in bad faith, assent to the proposed mode of payment and fail to make any objection to the tender as made, his acts may preclude him from enforcing a forfeiture and forcing a sale of the property after the debt becomes due. McCue *v.*

it [47] discharges the lien.[48] The twenty years' limitation of the mortgage is not shortened by the fact that it was to secure a note, unsealed and barred in six years,[49] but a discharge [50] or release [51] of the bond or note discharges the mortgage.

Defendants, who do not set up any equities as against plaintiff, should not be allowed to delay his judgment by

Bradbury, 149 Cal. 108, 84 Pac. Rep. 993.

[47] Hartley *v.* Tatham, 2 Abb. Ct. App. Dec. 333.

A tender made one day before the mortgage debt was due has been held insufficient. Bowen *v.* Julius, 141 Ind. 310, 40 N. E. Rep. 700.

[48] Kortright *v.* Cady, 21 N. Y. 343, rev'g 23 Barb. 490, s. c., 5 Abb. Pr. 358, affi'g 12 How. Pr. 424; Ketcham *v.* Crippen, 37 Cal. 223.

There is an apparent conflict of opinion as to the effect of a tender made after the law day. Some of the states still adhere to the common law rule, holding that a tender does not extinguish the lien but merely stops the running of interest from the date of the tender. In those states payment of the debt is apparently the only means of extinguishing the lien. See, as a typical case, Knollenberg *v.* Nixon, 171 Mo. 445, 72 S. W. Rep. 41, 94 Am. St. Rep. 790. In Kortright *v.* Cady, cited above, where it was held otherwise, the court stated: "acceptance of payment of the amount due on a mortgage, at any time *before foreclosure*, has always been held to discharge the incumbrance on the land; as acceptance of the amount for which personal property was held discharged it from the pledge. Tender and refusal are equivalent to performance. This is to be taken with the reservation already stated, that the debt or duty remained, and that the rejected tender, at or after the stipulated time of payment or performance, has the effect only to discharge the party thus making it from all the contingent, consequential or accessory responsibilities and incidents of his contract, but without releasing his prior debt." The affirmative relief of cancellation, however, will not be granted, unless the mortgagor pays the debt. Tuthill *v.* Morris, 81 N. Y. 94; Breunich *v.* Weselman, 100 N. Y. 609, 2 N. E. Rep. 385. In this respect the New York and Missouri case are in harmony.

[49] Sparks *v.* Pico, 1 McAll. 497; Heyer *v.* Pruyn, 7 Paige, 465. Compare Jackson *v.* Sackett, 7 Wend. 94; explained in Belknap *v.* Gleason, 11 Conn. 160.

[50] Driggs *v.* Simpson, 3 Supm. Ct. (T. & C.) 786, affi'd in 60 N. Y. 641.

[51] Blodget *v.* Wadhams, Hill & D. Supp. 65.

litigating issues between themselves, as to their priorities, or their equities as to the order of sale.[52]

V. ACTIONS TO REDEEM

45. Mode of Proof.

Oral evidence is admissible, to show that a deed absolute on its face [53] was intended by the parties as a mere security, even though there were no agreement to repay.[54] Proof of the continued existence of the debt is influential evidence of a mortgage, but not essential.[55] So is the circumstance of continued possession by the claimant after apparent conveyance to the defendant.[56] Proof of fraud or mistake is not necessary.[57] The agreement of defeasance, if oral, must be shown to have been contemporaneous.[58] Loose, oral dec-

[52] Smart *v.* Bement, 4 Abb. Ct. App. Dec. 253, N. Y. Code Civ. Pro., § 521; Newman *v.* Dickson, 1 Abb. New Cas. 307.

[53] Despard *v.* Walbridge, 15 N. Y. 374. Or a conditional sale for an agreed price. Russell *v.* Southard, 12 How. (U. S.) 139.

A deed, absolute on its face, may be shown by an accompanying written agreement to be a mortgage. Moss *v.* Odell, 141 Cal. 335, 74 Pac. Rep. 999.

[54] Horn *v.* Keteltas, 46 N. Y. 605, s. c., 42 How. Pr. 138. Compare Fullerton *v.* McCurdy, 55 N. Y. 637; Faulkner *v.* Cody, 45 Misc. Rep. 64, 91 N. Y. Supp. 633.

[55] Campbell *v.* Dearborn, 109 Mass. 130, s. c., 12 Am. Rep. 671, and cases cited.

[56] Id.

[57] Strong *v.* Stewart, 4 Johns. Ch. 167; Hodges *v.* Tenn., &c. Ins. Co., 8 N. Y. 416.

The right to redeem does not depend upon complainant's repudiation of the deed on account of fraud. The assertion of such right is in recognition of its validity, to the extent that it is binding as a security for the mortgage debt. Gerson *v.* Davis, 143 Ala. 381, 39 So. Rep. 198.

[58] Brown *v.* Johnson, 115 Wis. 430, 91 N. W. Rep. 1016; Barrett *v.* Carter, 3 Lans. 68.

An oral defeasance should be proved beyond a reasonable doubt, but the evidence need not be the direct testimony of a witness but may consist of extrinsic facts. Farmers', etc., Bank *v.* Smith, 61 N. Y. App. Div. 315, 10 N. Y. Supp. 536.

It must be alleged that the clause of defeasance was omitted by reason of ignorance, mistake, fraud or undue influence. Norris *v.* McLam, 104 N. C. 159, 10 S. Rep. 140.

larations of intention or understanding are not necessarily enough.[59] Evidence that the grantee was accustomed to lend on such absolute securities, is not relevant without anything to bring it home to the knowledge of the alleged borrower.[60] Evidence showing only a right to specific performance of a contract is a variance.[61]

A contemporaneous oral agreement, is no evidence of a waiver of the right of redemption inhering in a mortgage.[62] A subsequent release cannot be inferred from equivocal circumstances and loose expressions, but must appear by express writing or by such facts as estop.[63] And it must be for an adequate consideration.[64] On this question the value of the property and the fact of possession and enjoyment are

[59] 1 Greenl. Ev. 13th ed. 331.

The evidence must be clear and convincing. Renton *v.* Gibson, 148 Cal. 650, 84 Pac. Rep. 186; Rankin *v.* Rankin, 216 Ill. 132, 74 N. E. Rep. 763.

While some declarations may have a strong tendency to support plaintiff's claim, yet if those declarations are equally consistent with the theory that the deed was intended as an absolute conveyance, plaintiff cannot recover. Crowell *v.* Keene, 159 Mass. 352, 34 N. E. Rep. 405.

Grantor may testify as to the conditions upon which the conveyance was negotiated. Beroud *v.* Lyons, 85 Iowa, 482, 52 N. W. Rep. 486.

But the declarations of a deceased grantor to the effect that a deed absolute on its face was intended as a mortgage are inadmissible in behalf of the grantor's widow and heir and against the grantee. Hart *v.* Randolph, 142 Ill. 521, 32 N. E. Rep. 517.

[60] Sugart *v.* Mays, 54 Ga. 554.

But evidence that the grantee had refused to take a mortgage tends to show that the deed was not intended as a mere mortgage. Bacon *v.* National German-American Bank, 191 Ill. 205, 60 N. E. Rep. 846.

[61] Fullerton *v.* McCurdy, 55 N. Y. 637.

[62] Peugh *v.* Davis, 96 U. S. (6 Otto) 332. Or in an absolute deed and contemporaneous written defeasance. Palmer *v.* Gurnsey, 7 Wend. 248. *Contra*, Cooper *v.* Whitney, 3 Hill, 95; Baker *v.* Thrasher, 4 Den. 493.

As to whether a parol agreement to extend the time of the mortgagor within which to redeem after foreclosure is enforcible, compare Norman *v.* Gunton, 127 Fed. Rep. 871 with Taggert *v.* Blair, 215 Ill. 339, 74 N. E. Rep. 372.

[63] Peugh *v.* Davis (above).

[64] Id.

relevant.[65] The making of a payment is evidence against the payer, of his obligation, but is slight if any evidence, against the receiver, of the payer's title.[66]

VI. ACTIONS OF PARTITION

46. Mode of Proof.

Title may be proved as in ejectment.[67] This, with evidence of possession, actual or constructive,[68] (and possession

[65] Id.

[66] James *v.* Biou, 2 Sim. & Stu. 600, 606.

[67] And in case of default this is enough. Griggs *v.* Peckham, 3 Wend. 436. Whether title may be litigated, compare Hosford *v.* Merwin, 5 Barb. 51; Sterricker *v.* Dickinson, 9 Id. 516; Van Schuyver *v.* Mulford, 59 N. Y. 426.

As to whether a suit for partition can be resorted to as a substitute for the action of ejectment, see Dallam *v.* Sanchez, 56 Fla. 779, 47 So. Rep. 871.

[68] This is necessary. O'Dougherty *v.* Aldrich, 5 Den. 385; Sullivan *v.* Sullivan, 66 N. Y. 37, rev'g 4 Hun, 198, s. c., 5 Supm. Ct. (T. & C.) 433. Unless, perhaps, where the parties are all mere remaindermen, constructive possession is enough. Beebe *v.* Griffing, 14 N. Y. 235.

In Heinze *v.* Butte, etc., Min. Co., 126 Fed. Rep. 1, 61 C. C. A. 63, the court held that under the Montana statute, actual physical possession was not essential to enable a tenant in common or a joint tenant to bring a suit for partition. The possession necessary is the same as that which the law imputes to the holder of a legal title.

To same effect Girtman *v.* Starbuck, 48 Fla. 265, 37 So. Rep. 731, 5 Ann. Cas. 833; Bender *v.* Terwilliger, 48 N. Y. App. Div. 371, 63 N. Y. Supp. 269, aff'g 166 N. Y. 590, 59 N. E. Rep. 1118.

But see Sterling *v.* Sterling, 43 Oreg. 200, 72 Pac. Rep. 741 as to demurrability of a pleading which does not allege possession of the property sought to be divided between tenants in common. The court in that case stated: "If the plaintiff is out of possession, he cannot maintain a suit for partition until he first regains his possession in some appropriate proceeding. To invoke the jurisdiction of the court to make the partition, he must allege that he is in possession of the property as a tenant in common with the defendants. This is the plain requirement of the statute and in accordance with the decisions of this and other courts."

In Harrison *v.* International Silver Co., 78 Conn. 417, 62 Atl. Rep. 342, the court, expressing the same view, said: "Partition now, as heretofore, affords relief against a compulsory common ownership,

may be proved under the general allegation of seizin [68a]) is *prima facie* enough.[69] Proof of legal title, in the absence of any adverse possession, raises a sufficient presumption of possession.[70] A variance in stating the parties' interest,[71] or describing the premises,[72] is not fatal. In an action to test the validity of an alleged devise under the statute,[73] the burden is on plaintiff claiming against it to establish its invalidity.

but cannot be used to supplant the remedy at law against an actual disseisor. A person claiming to own land as tennant in common with others but who has been actually ousted, must establish a unity of possession before he can ask a dissolution of that unity by partition."

In Kansas it has been held that as between co-tenants or tenants in common, where it appears that defendant holds adversely to plaintiff, the latter, who is out of possession, cannot maintain a suit for partition without joining with the demand for partition a cause of action for the possession of the land. Denton *v.* Fyfe, 65 Kan. 1, 68 Pac. Rep. 1074, 93 Am. St. Rep. 284.

Under N. Y. Code Civ. Proc., § 1542, the plaintiff is bound to allege the facts upon which the defendants, if holding adversely, bases his title, if he is cognizant of the same; otherwise he must aver his ignorance, in which event it becomes incumbent on the defendant to present those facts. Satterlee *v.* Kobbe, 39 N. Y. App. Div. 420, 57 N. Y. Supp. 341.

[68a] Jenkins *v.* Van Schaack, 3 Paige, 242.

A cross complaint is sufficient without a direct allegation of possession. An allegation of ownership implies possession or the right thereto. Shetterly *v.* Axt, 37 Ind. App. 687, 76 N. E. Rep. 901, 77 N. E. Rep. 865.

But see Sterling *v.* Sterling, 43 Ore. 200, 72 Pac. Rep. 741.

[69] Clapp *v.* Bromaghan, 9 Cow. 530, 550, rev'g 5 Id. 295.

[70] Brownell *v.* Brownell, 19 Wend. 367; Bender *v.* Terwilliger, 48 App. Div. 371, 63 N. Y. Supp. 269, aff. 166 N. Y. 590, 59 N. E. Rep. 1118.

[71] See Ferris *v.* Smith, 17 Johns. 221; Thompson *v.* Wheeler, 15 Wend. 340; Clapp *v.* Bromaghan, 9 Cow. 530, 566; Noble *v.* Cromwell, 3 Abb. Ct. App. Dec. 382, s. c., 27 How. Pr. 289, affi'g 26 Barb. 475, s. c., 6 Abb. Pr. 59.

Where a bill for partition contained an allegation of seizin in fee and the proof showed that plaintiff's estate was subject to a widow's dower, it was held there was no variance. Holman *v.* Gill, 107 Ill. 467.

[72] See Corwithe *v.* Griffing, 21 Barb. 9.

[73] N. Y. Code Civ. Pro., § 1866; Voessing *v.* Voessing, 12 Hun, 678.

An ouster or adverse possession, relied on by a defendant, should be pleaded,[74] unless it appears in the complaint.[75] But the burden is still on plaintiff to prove seizin in common, if relied on.[76]

The relative claims and liens of defendants may be tried and settled under proper allegations.[77] A tenant in common claiming an allowance against his co-tenants for improvements made by him, need not show a request or promise;[78] otherwise of a stranger or sub-tenant who improved at his own risk.[79]

The mode of ascertaining present *value of life estates* is in some cases regulated by a statute or rule of court.[80] Where it is not, or if the statute or rule merely refers to the principles

[74] Jenkins *v.* Van Schaack, 3 Paige, 242; Sterricker *v.* Dickinson, 9 Barb. 516, 521.

Defendant's possession cannot become adverse without an ouster; and in order to prove a title by adverse possession he must show that he has had twenty years of sole possession of the land. Shannon *v.* Lamb, 126 N. C. 38, 35 S. E. Rep. 232.

"As between Coparceners and others claiming in priority, the entry and possession of one is always presumed to be in maintenance of the right of all, and this presumption will prevail in favor of all until some notorious Act of ouster or adversary possession is brought home to the knowledge of others, or it be clearly shown that he has become the owner by purchase. A clear, positive, and continued disclaimer of title, and the assertion of an adverse right, brought home to the knowledge of the other Coparceners, are indispensable, although great lapse of time, with other circumstances, may warrant the presumption of a disseisin or ouster by one Coparcener or other joint owner." Pillow *v.* Southwest Virginia Imp. Co., 92 Va. 144, 23 S. E. Rep. 32, 53 Am. St. Rep. 804.

[75] Burhans *v.* Burhans, 2 Barb. Ch. 398, 410.

Simply denying plaintiff's title on information and belief, without alleging adverse possession, does not put the title in issue. Heinze *v.* Butte, etc., Min. Co., 126 Fed. Rep. 1, 61 C. C. A. 63.

[76] Clapp *v.* Bromaghan, 9 Cow. 530.

[77] Bogardus *v.* Parker, 7 How. Pr. 305, N. Y. Code Civ. Pro., § 521. For the rule where there are mortgages of one tenant's interest, see Green *v.* Arnold, 11 R. I. 364, s. c., 23 Am. Rep. 466.

[78] Green *v.* Putnam, 1 Barb. 500.

[79] Scott *v.* Guernsey, 48 N. Y. 106, 123, affi'g 60 Barb. 163.

[80] See N. Y. Code Civ. Pro., §§ 1568–1569 and Rule 70 of General Rules of Practice.

governing annuities, etc., any standard table, recognized by the court, or shown to be such by the testimony of a qualified witness, is competent;[81] and evidence that the condition of health and strength is substantially different from that usually enjoyed by persons of the same age is competent for the purpose of varying the conclusion drawn from the table;[82] in the absence of such evidence the tables

[81] The court may take judicial notice that the tables produced are approved standards. See McHenry *v.* Yokum, 27 Ill. 160; Donaldson *v.* R. R. Co., 18 Iowa, 280, 291; Wager *v.* Schuyler, 1 Wend. 553. American tables and experts in insurance testify to a probability of longer life than indicated in the Northampton Tables, and somewhat longer than indicated in the Carlisle. The following tables have been recognized by the courts: *American Experience Table* (contained in the Michigan Insurance Company act. Comp. Laws, 997). Brown *v.* Bronson, 35 Mich. 415. Also contained in 2 N. Y. R. S. 6th ed. 678. *Wigglesworth's* (cited from 2 Am. Ac. of A. & S. 131). Estabrook *v.* Hapgood, 10 Mass. 313, 315; Mills *v.* Catlin, 22 Vt. 98, 106, also cited from Oliver's Conveyancer, in Mills *v.* Catlin, 22 Vt. 98, 106; reprinted in 3 Bush (Ky.), xii–xv; Alexander *v.* Bradley, Id. 667. *The Carlisle Tables.* Greer *v.* Mayor, &c., 1 Abb. Pr. N. S. 206, s. c., 4 Robt. 675; Donaldson *v.* R. R. Co., 18 Iowa, 180, 291, New Jersey Rule of Court, Nix. Dig. 1106, 1111. Also in 3 Bush (Ky.), xi. The original is in Milne on Annuities. *The Northampton Tables.* See cases in note to paragraph 50 of chapter XXXI of this vol., and N. Y. General Rules of Practice, Rule 70; Georgia R. R. Co. *v.* Oakes, 52 Ga. 410. The original is in 2 Price on Reversionary Payments. The extract from the Northampton Tables, printed in the N. Y. Supreme Court rules (and copied in Gary's Probate Law, xl), is erroneous in stating the valuation opposite the years 6, and 73 to 80 inclusive. The first error is in substituting the terminal 6 for 0. The errors in the later period consist in substituting the value appropriate for 7 per cent. in place of that for 6 per cent. *McKane's P. I. Tables. Hendry's Ann. T.* Jackson *v.* Edwards, 7 Paige, 386, 408. For a notice of the origin of such tables, see William's Case, 3 Bland. Ch. 186, 221, 233, 238. Where the court does not take judicial notice of the work offered as containing the table, it should be admitted on the testimony of a witness that he has experience in the business of life insurance, and knows the volume produced to be the work containing the original tables, or a standard work recognized in a reputable life insurance office as containing a true copy of the tables.

[82] Alexander *v.* Bradley, 3 Bush

will prevail.[83] The opinion of witnesses as to the cash value of a life estate is not admissible.[84]

(Ky.), 667, and see McLaughlin *v.* McLaughlin, 20 N. J. Eq. (5 C. E. Green) 190; Abercrombie *v.* Biddle, 3 Md. Ch. 320, 325; and is not necessarily incompetent even under a rule of court which makes a given table the guide. The rule is used merely as a means of approximation, and the circumstances and condition of the life in each case are relevant. Haulenbeck *v.* Cronkright, 23 N. J. Eq. 407, affi'd in 25 N. J. Eq. 159.

[83] Alexander *v.* Bradley, 3 Bush (Ky.), 667; Brown *v.* Bronson, 35 Mich. 415, 421. *Contra*, Shippen's Appeal, 80 Pa. St. 391, s. c., 2 Weekly N. 468. Extrinsic evidence is also proper as to the contingencies upon which an inchoate right ripen (see Benedict *v.* Seymour, 11 How. Pr. 176), except that so far as it depends on survivorship among two or more joint lives the rules above stated apply. See Jackson *v.* Edwards, 7 Paige, 386, 408, affi'd in 22 Wend. 498. Possibility and likelihood of issue, when relevant, are subjects for expert testimony.

[84] Alexander *v.* Bradley, 3 Bush (Ky.), 667.

CHAPTER XLIX

ACTIONS BETWEEN VENDOR AND PURCHASER

1. The contract.
2. Oral evidence to explain.
3. Implied covenants; time.
4. Title.
5. Plaintiff's performance; breach.
6. Value.
7. Contract merged by deed.
8. Actions to recover back purchase-money.
9. Fraud or misrepresentation.
10. Specific performance; the contract.
11. — oral contract partly performed.
12. — plaintiff's title and performance.

1. The Contract.

The general rules as to the proof of execution and oral evidence to vary, have been already stated.[85] A variance in stating the contract in a respect which does not vary the resulting liability, is not material.[86]

[85] *Order of proof*, p. 1304; execution proved by certificate of *acknowledgment* or proof, note to paragraph 4 of chapter XLVIII; proof by *subscribing witness*, p. 1305; proof of *handwriting*, pp. 997–1017; *seal*, pp. 998 and 1306; execution by *corporation* and corporate seal, pp. 50–57; by religious corporation (Bowen *v.* Irish Presb. Cong., 6 Bosw. 245; Moore *v.* St. Thomas' Ch., 4 Abb. New Cas. 51, and cases); authority of *agent*, p. 1312 of this vol. (Savery *v.* Sypher, 6 Wall. 157); *date*, pp. 1053 and 1317–1319 of this vol.; contract by *letter*, p. 766 (Nesham *v.* Selby, L. R. 13 Eq. Cas. 191, s. c., 1 Moak's Eng. 640; Crossley *v.* Maycock, L. R. 18 Eq. Cas. 180, s. c., 9 Moak's Eng. R. 727); contract by *telegram*, p. 766 (Godwin *v.* Francis, L. R. 5 C. P. 295, 39 L. J. C. P. 121); contract by *auction*, p. 851 (Elfe *v.* Gadsden, 2 Rich. (S. C.) 407; Torrance *v.* Bolton, L. R. 8 Ch. App. 118, s. c., 4 Moak's Eng. 800; Vandever *v.* Baker, 13 Penn. St. 121. 127; Phillips *v.* Higgins, 7 Lans. 314, affi'd in 55 N. Y. 663); execution in *duplicate* or *counterpart*, p. 1358; subsequent *modification*, p. 1325–1326 (Benedict *v.* Lynch, 1 Johns. Ch. 370; Bradford *v.* Union Bank of Tennessee, 13 How. (U. S.) 57).

[86] Nance *v.* Gray, 143 Ala. 234,

If the contract is denied, plaintiff's evidence must satisfy the statute of frauds, or show that the case is not within the statute.[87] If defendant answers, and does not deny the contract, nor indicate that he relies on the statute, the statute does not avail to exclude oral evidence of the contract thus admitted.[88] An oral agreement may be proved, notwithstanding the statute of frauds, where plaintiff has parted with value on the faith of it, placing himself in a situation in which he would be defrauded by refusal to enforce the contract.[89]

Where the parties make their contract in writing, delivery of the instrument is material.[90]

38 So. Rep. 916; Lobdell *v.* Lobdell, 36 N. Y. 327, 4 Abb. Pr. N. S. 56, 33 How. Pr. 347, s. c., 32 How. Pr. 1; Crary *v.* Smith, 2 N. Y. 60. As to variance, see, also, Chapter XXVIII, paragraph 1 of this vol.; Sherman *v.* Sherman, 67 So. Rep. 225.

[87] Hill *v.* Jones, 7 Ga. App. 394, 66 S. E. Rep. 1099; Ratterman *v.* Campbell, 26 Ky. Law Rep. 173, 80 S. W. Rep. 1155; Reynolds *v.* Dunkirk & State Line R. R. Co., 17 Barb. 613; Coquillard *v.* Suydam, 8 Blackf. (Ind.) 24, 30. Even if the answer sets up a different contract. Morrill *v.* Cooper, 65 Barb. 512, 516.

[88] Rauck *v.* Wickwire, 255 Mo. 42, 164 S. W. Rep. 460; Whiting *v.* Gould, 2 Wis. 552, 594. Oral extension of time within which an offer to sell real estate might be accepted cannot be shown, because the whole of the contract for the sale of real estate must be in writing. Atlee *v.* Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 103, 33 N. W. Rep. 110.

[89] Sursa *v.* Cash, 171 Mo. App. 396, 156 S. W. Rep. 779; Jones *v.* Ceres Inv. Co., 60 Colo. 562, 154 Pa. 745; Matthes *v.* Wier (Del.), 84 Atl. Rep. 878; Dodge *v.* Wellman, 1 Abb. Ct. App. Dec. 512; Sandford *v.* Norris, 4 Abb. Ct. App. Dec. 144; Levy *v.* Brush, 45 N. Y. 589, is distinguished in Traphagen *v.* Burt, 67 N. Y. 30, as a case where plaintiff has taken nothing and parted with nothing. And see Baker *v.* Wainwright, 36 Md. 336, s. c., 11 Am. Rep. 495.

[90] Deitz *v.* Farish, 44 Super. Ct. (J. & S.) 190; see, also, Chapter XXVII, paragraph 6 of this vol. Where they make an oral contract, a note or memorandum, relied on merely as evidence under the statute of frauds, may be sufficient without delivery to the other party. Parrill *v.* McKinley, 9 Gratt. 1, 7; Bowles *v.* Woodson, 6 Id. 78. Thus a letter written by one of the parties to a third person, may be a sufficient memorandum. Pomeroy Sp. Perf. 122, § 84, Rosc. N. P. 318; Brown Bros. Lumber Co. *v.* Pres-

2. Oral Evidence to Explain.

If the instrument, expressly or by description, shows who the parties are (an agent being considered as equivalent to a party, where the agreement purports to be made by him), extrinsic evidence is admissible to explain the situation and relations of these parties, their business, and the circumstances surrounding the transaction.[91] In application of what has been already said,[92] oral evidence is competent (it may, however, be wholly insufficient by reason of the statute of frauds[93]) to explain an ambiguity in reference to the premises described,[94] the covenants and stipula-

ton Mill Co., 83 Wash. 648, 145 Pac. Rep. 964; Fitzkee *v.* Hoeflin, 187 Ill. App. 514; Smith *v.* Severn, 93 Nebr. 148, 39 N. W. Rep. 858; Kissena Park Corp. *v.* Fradkin, 141 N. Y. Supp. 930.

[91] McMahan *v.* Black Mountain Ry. Co., 170 N. C. 456, 87 S. E. Rep. 237; Wellington Realty Co. *v.* Gilbert, 24 Colo. App. 118, 131 Pac. Rep. 803; Pomeroy Sp. Perf. 127, § 88. Even for the purpose of making it appear which is the vendor and which is the purchaser. Id. As to oral evidence to show the true party, see, also, Briggs *v.* Partridge, 64 N. Y. 357, 364; Beardsley *v.* Duntley, 69 N. Y. 577, 581; Lynde *v.* Staats, 1 N. Y. Leg. Obs. 89, and cases cited; and see Chapter XXVII, paragraph 12 of this vol.; Kennewick First Nat. Bank *v.* Conway, 87 Wash. 506, 151 Pac. Rep. 1129.

[92] See Chapter XVI, paragraph 8, of this vol.

[93] Hicks *v.* Rupp, 49 Mont. 40, 140 Pac. Rep. 97; Readicker *v.* Denning, 87 Kan. 523, 125 Pac. Rep. 29; Whelan *v.* Sullivan, 102 Mass. 204, 2 Whart., § 871; Wright *v.* Weeks, 25 N. Y. 153. Notwithstanding statute of frauds evidence is admissible of parol agreement as to proceeds of sale of land, although the contract for the sale of the land was in writing, if it was made subject to the agreement as an inducement to such contract. Michael *v.* Foil, 100 N. C. 178, 6 Am. St. Rep. 577, 6 S. E. Rep. 264.

[94] Garvey *v.* Parkhurst, 127 Mich. 368, 86 N. W. Rep. 802; Phillips *v.* Higgins, 7 Lans. 314, affi'd 55 N. Y. 663; Brinkerhoff *v.* Olp, 35 Barb. 27; S. P., Pettit *v.* Shepard, 32 N. Y. 97; Mead *v.* Parker, 115 Mass. 413, S. C., 15 Am. Rep. 110; Magee *v.* Lavell, L. R. 9 C. P. 107, S. C., 8 Moak's Eng. 423; Beaumont *v.* Field, 1 B. & Ald. 247, Rosc. N. P. 32, 35, 318. And so as to fixtures. Martin *v.* Cope, 3 Abb. Ct. App. Dec. 182. When lands are bounded in such phrases as "by," or "upon," or "along," a highway or stream not navigable, unless by the terms of the grant or by necessary implication the

tions,[95] the proportionate interest of purchasers,[96] and the like.[97]

3. Implied Covenants: Time.

An executory contract for the sale of real estate implies (unless what is expressed indicates the contrary) a covenant for title, which continues till merged by conveyance.[98] If

highway or bed of the stream are excluded, the intent to grant a title to the center of the highway or stream will be presumed. This depends upon the intent of the parties, to be gathered from the description of the premises read in connection with the other parts of the deed, and by reference to the situation of the lands, and the condition and relation of the parties to those and other lands in the vicinity. An intent to exclude the highway or bed of the stream will not be presumed, but must appeal from the terms of the deed as interpreted and illustrated by surrounding circumstances. Mott *v.* Mott, 68 N. Y. 246, 253; Kidder *v.* Childs, 130 N. Y. App. Div. 259, 114 N. Y. Supp. 561; Burns *v.* Witter, 56 Or. 368, 108 Pac. Rep. 129.

[95] Page *v.* McDonnell, 55 N. Y. 299, affi'g 46 How. Pr. 52; Smith *v.* Toth (Ind.), A. 111 N. E. Rep. 442; Northwestern Lumber Co. *v.* Grays Harbor, etc., Co., 208 Fed. Rep. 624.

[96] Brothers *v.* Porter, 6 B. Monr. (Ky.) 106.

[97] Upon principles already stated chapters V, paragraphs 79, 80, XLVIII, paragraph 10 of this vol.), the oral evidence cannot stand in the place of a writing to satisfy the statute of frauds, but the writing must be such that after receiving the extrinsic evidence the court can see with sufficient certainty that the writing itself means and expresses the contract alleged. For instance, a contract to sell a tract of land not identified except as being near the junction of two roads, is not alone sufficient to call for specific performance as to any particular tract. Dobson *v.* Litton, 5 Coldw. 616. See also Rosen *v.* Phelps (Tex. Civ. App.), 160 S. W. Rep. 104. But a contract to convey a lot situated on a street named, together with extrinsic evidence consistent with the writing that the vendor had one and only one lot on that street, is enough. Harley *v.* Brown, 98 Mass. 545. On the other hand, a contract only designating the land as being the same conveyed by government to C. and D. and by C. and D. to A., cannot be varied by evidence that it was only intended to apply to land derived through C. alone or through D. alone. Marshall *v.* Haney, 4 Md. 498, 506.

[98] Winkler *v.* Ferrue, 20 Col. App. 555, 129 Pac. Rep. 804; Wallach *v.* Riverside Bank, 206 N. Y. 434, 100

the language of the contract does not determine whether time is material, extrinsic evidence of surrounding circumstances is relevant. A subsequent agreement, extending time, will sustain an inference that it was material.[99]

4. Title.

If plaintiff's title is in issue in an action on his executory contract to convey, the burden of proof is on him to show good title affirmatively,[1] or that the purchaser agreed to accept such title as he had.[2] A conveyance to him, with possession under it, is not enough under a direct issue on title.

The relation between vendor and purchaser does not estop the latter from disputing the former's title,[3] unless he

N. E. Rep. 50, affi'g 134 App. Div. 962, 119 N. Y. Supp. 1149; Molloy *v.* Foley (Iowa), 133 N. W. Rep. 778; Mutchnick *v.* Davis, 130 App. Div. 417, 114 N. Y. Supp. 997; Burwell *v.* Jackson, 9 N. Y. 535; and see Thomas *v.* Bartow, 48 Id. 193; Leggett *v.* Mut. L. Ins. Co. of N. Y., 53 N. Y. 394, 398. So of a contract for sale of a leasehold interest, unless a tax lease. Boyd *v.* Schlesinger, 59 N. Y. 301, 307.

[99] Wiswall *v.* McGown, 2 Barb. 270, affi'd *sub nom.* Price *v.* McGown, 10 N. Y. 465.

Evidence that the purchaser communicated to the vendor the fact that he was a builder and wanted the *locus in quo* in order that he might build thereon at the same time that he was to erect certain buildings on adjoining plots, establishes the fact that time was of the essence of the contract. Smith *v.* Browning, 171 App. Div. 278, 157 N. Y. Supp. 71; Kentucky Distilleries, etc., Co. *v.* Warwick Co., 109 Fed. Rep. 280, 48 C. C. A. 363; Darrow *v.* Cornell, 30 App. Div. 15, 51 N. Y. Supp. 828; Garrett *v.* Cohen, 63 Misc. 450, 117 N. Y. Supp. 129.

[1] Wilson *v.* Holden, 16 Abb. Pr. 133, 136; Hixson *v.* Hovey, 18 Cal. A. 230, 122 Pac. Rep. 1097; Matter of Clarke, 131 App. Div. 688, 116 N. Y. Supp. 101; Sherman *v.* Beam, 27 S. D. 218, 130 N. W. Rep. 442.

[2] Negley *v.* Lindsay, 67 Penn. St. 217, s. c., 5 Am. Rep. 427; Wilson *v.* Holden (above). As to evidence of incumbrance, see Anonymous, 2 Abb. New Cas. 56; Riggs *v.* Pursell, 66 N. Y. 193; Reeder *v.* Scheider, 1 Hun, 121. As to offer to discharge. Rinaldo *v.* Housmann, 1 Abb. New Cas. 312; Stewart *v.* Kreuzer, 127 Md. 1, 95 Atl. Rep. 1052.

[3] Blight *v.* Rochester, 7 Wheat. 535; Groves *v.* Whittenberg (Tex. Civ. App.), 165 S. W. Rep.

gained and is retaining possession under the agreement.[4] On the question of plaintiff's title, his own declarations are competent in his favor, when part of the *res gestæ* of an act affecting the title, already properly in evidence.[5] An abstract of title furnished by the seller to the buyer to aid in his search is competent against the seller, as showing his claim of title, for the purpose of proving defects in such title.[6] The opinions of witnesses are not competent.[7]

5. Plaintiff's Performance: Breach.

An allegation of performance of a condition,[8] does not admit evidence of a waiver or other excuse for non-perform-

889; Jackson *v.* Welsh Land Assoc., 51 W. Va. 482, 41 S. E. Rep. 920.

[4] See chapter XLVIII, paragraph 20 of this vol. Compare Coray *v.* Matthewson, 7 Lans. 80; Bennett *v.* U. S. Land, etc., Co., 16 Ariz. 138, 141 Pac. Rep. 717; Chavey *v.* Bergere, 231 U. S. 482, 34 S. Ct. 144, 58 L. ed. 325; Page *v.* Bradford-Kennedy Co., 19 Ida., 685, 115 Pac. Rep. 694, Ann. Cas. 1912, 2402.

[5] Devling *v.* Little, 26 Penn. St. 502, 506. The rule as to admissions and declarations of predecessors in the title (stated in chapter XLVIII, paragraph 30 of this vol.) applies. See Pearce *v.* Nix, 34 Ala. 183, 185; Vint *v.* King, 2 Am. Law Reg. 712; Curtis *v.* Armagast, 158 Iowa, 507, 138 N. W. Rep. 873; Mann *v.* Cavanaugh, 110 Ky. 776, 62 S. W. Rep. 854, 23 Ky. L. 238; Rankin *v.* Rankin, 105 Tex. 451, 151 S. W. Rep. 527.

[6] Hartley *v.* James, 50 N. Y. 38; McLaughlin *v.* Brown (Tex.), 126 S. W. Rep. 292; Bryan *v.* Straus, 157 Mich. 49, 121 N. W. Rep. 301; Day *v.* Mountain, 137 Fed. Rep. 756; 70 C. C. A. 190; Spooner *v.* Cross, 127 Iowa, 259, 102 N. W. Rep. 1118.

[7] Winter *v.* Stock, 29 Cal. 407, 412; Aroian *v.* Fairbanks, 216 Mass. 215, 103 N. E. Rep. 629; Reed *v.* Sefton, 11 Cal. App. 88, 103 Pac. Rep. 1095; Walters *v.* Mitchell, 6 Cal. App. 410, 92 Pac. Rep. 315.

[8] As to the cases in which performance or tender must be proved, see Hartley *v.* James, 50 N. Y. 38, 42; Doyle *v.* Harris, 11 R. I. 539; Delavan *v.* Duncan, 49 N. Y. 485; Burling *v.* King, 66 Barb. 633, 642, s. c., 2 Supm. Ct. (T. & C.) 545; McCotter *v.* Lawrence, 4 Hun, 107, s. c., 6 Supm. Ct. (T. & C.) 392; Hoag *v.* Parr, 13 Hun, 95, 100; Kister *v.* Pollak, 125 App. Div. 226, 109 N. Y. Supp. 204; Booth *v.* Milliken, 127 App. Div. 522, 111 N. Y. Supp. 791; Berseker *v.* Amberson, 16 N. D. 215, 116 N. W. Rep. 94.

ance.[9] But an allegation of tender, where it is not part of the contract, but an act *in pais*, does admit evidence of a waiver.[10] Tender to and refusal by joint-purchasers is proved by tender to and refusal by one. Omission to deny due allegation of a request and refusal, dispenses with necessity of proving demand.[11] Evidence of the second demand, sometimes required, is admissible without being alleged.[12]

In general, proof of absolute refusal before the expiration of the time fixed for performance is not enough,[13] unless the party refusing had put it out of his power to perform,[14] or the refusal was communicated and was intended to, and did, influence the conduct of the other party, to his damage.[15]

6. Value.

Upon principles already stated,[16] a witness, who is shown,

[9] Baldwin *v.* Munn, 2 Wend. 399; Oakley *v.* Morton, 11 N. Y. 25.

[10] Holmes *v.* Holmes, 9 N. Y. 525, affi'g 12 Barb. 137; Carman *v.* Pultz, 21 N. Y. 547. Compare chapter XV, paragraphs 61–64 of this vol.

Tender, though alleged, need not be proven, where the plaintiff's action is in rescission of the contract because of the vendor's inability to perform. Miner *v.* Hilton, 15 App. Div. 55, 44 N. Y. Supp. 155; Marshall *v.* Wenninger, 20 Misc. 527, 46 N. Y. Supp. 670.

[11] Fagan *v.* Davison, 2 Duer, 153, 159.

[12] Pearsoll *v.* Frazer, 14 Barb. 564.

[13] Daniels *v.* Newton, 114 Mass. 530, s. c., 19 Am. Rep. 384; King *v.* Waterman, 55 Neb. 324, 75 N. W. Rep. 830; *Contra*, Matteson *v.* U. S., etc., Land Co., 103 Minn. 407, 115 N. W. Rep. 195.

[14] Wolff *v.* Meyer, 75 N. J. L. 181, 66 Atl. Rep. 959, affi'd 76 N. J. Law 574, 70 Atl. Rep. 1103; Montgomery *v.* Wise, 138 Mo. App. 176, 120 S. W. Rep. 100; Munson *v.* McGregor, 49 Wash. 276, 94 Pac. Rep. 108; Sears *v.* Conover, 4 Abb. Ct. App. Dec. 179. This fact, if relied on, should be pleaded. Van Rensselaer *v.* Miller, Hill & D. Supp. 237.

[15] This seems to be the sound principle and goes far toward reconciling the cases, which, failing to express it, are often in apparently hopeless conflict. See Chapter XVI, paragraph 61, and Chapter XIX, paragraph 41 of this vol.; Skinner *v.* Tinker, 34 Barb. 333; Thomas *v.* Wickman, 1 Daly, 58; Maffet *v.* Cregon, etc., R. Co., 46 Cr. 443, 80 Pac. Rep. 489; Rowersock *v.* Beers, 82 Ill. App. 396.

[16] See chapter XVI, paragraphs

to the satisfaction of the court, to have such conversance with the values of real property in the place as to enable him to form a reliable opinion, may testify to the value of the property, and to the effect on it of conditions involved in the litigation.[17] If the premises have a market value, a witness, conversant with market value, may give his opinion without having examined the premises.[18] If the qualification of a witness is conversance with value for certain purposes only,—as, for instance, a farmer in the vicinity who is deemed qualified to express an opinion of value for farming purposes,—he may express an opinion as to value for such purposes; but not an unqualified opinion if the property may be valuable for other purposes.[19] It is not necessary that the witnesses shall be engaged in buying and selling land, nor that they should have knowledge of an actual sale of that or similar land, to make them competent. A farmer living in the vicinity is competent to give his opinion as to value when it is shown that he knows the situation and character of land, its productiveness and availability for use, and who further states that he knows the value of the same.[20] A witness, having properly testified to his

20 and 85 and chapter XXXI, paragraph 40 of this vol.

[17] Tucker *v.* Mass. Cent. R. R. Co., 118 Mass. 547; Baltimore *v.* Yost, 121 Md. 366, 88 Atl. Rep. 342; Chicago *v.* Lehmann, 262 Ill. 468, 104 N. E. Rep. 829; Drexler *v.* Braddock, 238 Pa. 376, 86 Atl. Rep. 272; Dady *v.* Condit, 209 Ill. 488, 70 N. E. Rep. 1088.

[18] Lawrence *v.* City of Boston, 119 Mass. 126; Louisiana R., etc., Co. *v.* Kohn, 116 La. 159, 40 So. Rep. 602; Farin *v.* Nelson, 31 N. D. 636, 155 N. W. Rep. 35.

[19] Brown *v.* Prov. & Springf. R. R. Co., 8 Reporter, 376; Hawkins *v.* City of Fall River, 119 Mass. 94.

[20] Yazoo-Mississippi Comrs., etc., *v.* Dillard, 76 Miss. 641, 25 So. Rep. 292; Kansas City Ry. Co. *v.* Allen, 24 Kan. 33; Robertson *v.* Knapp, 35 N. Y. 91; Keithsburg, &c. R. Co. *v.* Henry, 79 Ill. 290; Pennsylvania, &c. R. Co. *v.* Bunnell, 81 Pa. St. 414; Central Pac. R. Co. *v.* Pearson, 35 Cal. 247; Montana Ry. Co. *v.* Warren, 6 Mont. 275; Leroy, &c. Ry. Co. *v.* Hawk, 39 Kan. 638, 7 Am. St. Rep. 566, 18 Pac. Rep. 943. "The witnesses whose testimony is complained of, all testified that they knew the land and its surroundings; and many of them that they had dealt in mining claims situated in the district, and had opinions

opinion, may state the reasons of it. Evidence of the price brought by similar lands in the same vicinity is not competent.[21] The evidence of value should relate to the time in question with reasonable proximity.[22]

7. Contract Merged by Deed.

Acceptance of a deed under the contract, although it varies from it, is *prima facie* evidence of extinguishment of the vendor's obligations as to title, extent of possession, quantity and emblements.[23] In these respects, it is presumed

as to the value of the property. It is true, some of them did not claim to be familiar with sales of other property in the immediate vicinity; and the want of that means of knowledge is the specific objection made in the Supreme Court of the territory, to the competency of those witnesses. But the possession of that means of knowledge is not essential. It has often been held that farmers living in the vicinity of a farm whose value is in question, may testify as to its value although no sales have been made to their knowledge of that or similar property. Indeed, if the rule were as stringent as contended, no value could be established in a community until there had been sales of the property in question, or similar property. After a witness has testified that he knows the property and its value, he may be called upon to state such value.

The means and extent of his information, and therefore the worth of his opinion, may be developed at length on cross-examination." Montana Ry. Co. *v.* Warren, 137 U. S. 348, 354. See also, Wickstrum *v.* Carter, 9 Kan. App. 439, 58 Pac. Rep. 1020.

[21] Walker *v.* Bryant, 112 Ga. 412, 37 S. E. Rep. 749; Huntington *v.* Attrill, 118 N. Y. 365, 23 N. E. Rep. 544; In re Thompson, 127 N. Y. 463, 470, 28 N. E. Rep. 389, *contra*, Gardner *v.* Brookline, 127 Mass. 358; Culbertson & Blair Packing, etc., Co. *v.* City of Chicago, 111 Ill. 651; Town of Cherokee *v.* S. C. & I. F. Town Lot & Land Co., 52 Iowa, 279; Concord R. Co. *v.* Greely, 23 N. H. 242; Washburn *v.* Milwaukee & Lake Winnebago R. Co., 59 Wis. 364.

[22] Sanford *v.* Shepard, 14 Kan. 228; Sullivan *v.* Missouri, etc. R. Co., 29 Tex. Civ. App. 429, 68 S. W. Rep. 745; Harraway *v.* Harraway, 136 Ala. 499, 34 So. Rep. 836; Dady *v.* Condit, 209 Ill. 488, 70 N. E. Rep. 1088; Addis *v.* Swofford (Mo.), 180 S. W. Rep. 548.

[23] Benesh *v.* Travellers' Ins. Co., 14 N. D. 39, 103 N. W. Rep. 405; Schmitz *v.* Roberts, 26 Pa. Super. Ct. 472; Hunt *v.* Amidon, 4 Hill, 345; Smith *v.* Price, 39 Ill. 28; Lloyd *v.* Farrell, 48 Pa. St. 73, 78, 6 Abb. N. Y. Dig. new ed. 104,

that the deed contains the final agreement of the parties,[24] and that the grantee intended to give up the benefit of covenants of which the conveyance is not a performance or satisfaction;[25] but the presumption may be rebutted by proof of the express agreement of the parties.[26]

8. Act ons to Recover Back Purchase-Money.

To recover back purchase-money, on the ground of failure of title,[27] the burden is on plaintiff[28] to prove the

&c. It seems that the fact that a substituted covenant or conveyance was accepted in consummation of the covenant, may be proved by parol. Thomas *v.* Bartow, 48 N. Y. 193, 197; Dulin *v.* Sharp, 43 App. Cas. D. C. 550.

[24] Murdock *v.* Gilchrist, 52 N. Y. 242, 246; Corrough *v.* Hamill, 110 Mo. App. 53, 84 S. W. Rep. 96.

[25] Morris *v.* Whitcher, 20 N. Y. 41.

[26] Rich *v.* Scales, 116 Tenn. 57, 91 S. W. Rep. 50; Sessa *v.* Arthur, 183 Mass. 230, 66 N. E. Rep. 804; Lehman *v.* Paxton, 7 Pa. Super. Ct. 259; Murdock *v.* Gilchrist, 52 N. Y. 242, 247. Damages accruing from breach of warranty of the quality of land conveyed by deed may be proved by parol, though the deed contains only the ordinary and usual covenants, and the covenant as to quality is not in writing. Green *v.* Batson, 71 Wis. 54, 5 Am. St. Rep. 194, 36 N. W. Rep. 849. The purchaser is not necessarily presumed to know whether the deed accepted embraced all the land contracted for; and fraud in inducing the acceptance of a deed conveying only a part may be proved. Beardsley *v.* Duntley, 69 N. Y. 577, 581. So of mistake, where the grantor was intrusted to prepare the deed and untruly described the premises. Wilson *v.* Van Pelt, 2 Supm. Ct. (T. & C.) 414, and cases cited. That both parties were ignorant of an incumbrance is not relevant, if both had equal and adequate means of information. Whittemore *v.* Farrington, 12 Hun, 349. In an action to recover goods sold, false oral representations by the purchaser (on credit) as to his financial condition may be shown by the seller, who sold in reliance thereon, though written representations were made at the same time. Jandt *v.* Potthast, 102 Iowa, 223, 71 N. W. Rep. 216.

[27] As to the necessary facts, see Page *v.* McDonnell, 55 N. Y. 299, affi'g 46 How. Pr. 52; Thomas *v.* Barton, 48 N. Y. 193; Friedman *v.* Dewes, 33 Super. Ct. (1 J. & S.) 450; Wheeler *v.* Mather, 56 Ill. 241, s. c., 8 Am. Rep. 683; Reynolds *v.* White, 134 App. Div. 248, 118 N. Y. Supp. 979; Poheim *v.* Meyers, 9 Cal. App. 31, 98 Pac. Rep. 65; Whitaker *v.* Willis (Tex. Civ. App.), 146 S. W. Rep. 1004.

[28] Treat *v.* Orono, 26 Me. (13 Shep.) 217.

In an action to recover purchase-

failure of title, or fraud alleged,[29] as well as the payments made.[30] In an action to recover back for a deficiency in the land, evidence as to what was said and done prior to the execution of the written contract and the deed is competent, not to contradict what is expressed, but to show intent and mistake.[31] Deficiency, if great, may sustain an inference of fraud, but is not conclusive.[32]

9. Fraud or Misrepresentation.

Under a denial of title, fraudulent misrepresentation involved in proof of a breach, is competent.[33] The test of materiality in a variance in dimensions is,—had the falsity been known, would the contract have been entered into? [34] False representations alleged as a ground of relief, should be proved as in an action for deceit.[35] Wilful suppression

money, based upon a rescission of the contract, it is incumbent upon the plaintiff to establish such rescission; and such burden of proof is not discharged by evidence that plaintiff gave up the burdens of the contract if it does not also appear that he gave up, or has offered to give up, its benefits. Lasbury *v.* Scarpulla, 156 N. Y. S. 744; Reynolds *v.* White, 143 App. Div. 595, 128 N. Y. Supp. 529; Peterson *v.* Hultz, 96 Neb. 406, 147 N. W. Rep. 1126.

[29] Stephens *v.* Barnes, 30 Pa. Super. Ct. 127; Braun *v.* Vollmer, 89 App. Div. 43, 85 N. Y. Supp. 319; Meyer *v.* Madreferla, 68 N. J. Law 258, 53 Atl. Rep. 477, 96 Am. St. Rep. 536; Black *v.* Walker, 98 Ga. 31, 26 S. E. Rep. 477. Fraud cannot be proved unless alleged. Noonan *v.* Lee, 2 Blackf. 499, 508, and cases cited.

[30] O'Brien *v.* Cheney, 5 Cush. (Mass.) 148.

[31] Hall *v.* Ely, 25 Ky. Law Rep. 954, 76 S. W. Rep. 848; Wilson *v.* Randall, 67 N. Y. 338, affi'g 7 Hun, 15, and see King *v.* Knapp, 59 N. Y. 462.

The acceptance of the deed may be explained by parol evidence of an agreement to fix the amount of the purchase-money by a subsequent survey. Murdock *v.* Gilchrist, 52 N. Y. 242, 246; Boggs *v.* Bush (Ky.), 122 S. W. Rep. 220.

[32] Kreiter *v.* Bomberger, 82 Pa. St. 59, s. c., 22 Am. Rep. 750, 2 Weekly Notes, 685, 687; Winton *v.* McGraw, 60 W. Va. 98, 54 S. E. Rep. 506.

[33] Rosc. N. P. 328.

[34] Stokes *v.* Johnson, 57 N. Y. 673; Slingluff *v.* Dugan, 98 Md. 518, 56 Atl. Rep. 837; Boggs *v.* Bush (Ky.), 122 S. W. Rep. 220; Travis *v.* Taylor (Ky.), 118 S. W. Rep. 988; Urbach *v.* Pye, 55 Misc. 465, 105 N. Y. Supp. 143.

[35] Chapter XXXIV; Trammel

of material evidence has peculiar significance, in an action for specific performance.[36]

10. Specific Performance: the Contract.

The proof must be clear, definite and conclusive, and must show a contract, leaving no *jus deliberandi*, or *locus pœnitentiæ*. It cannot be made out by mere hearsay, or evidence of declarations made to strangers.[37] Inadequacy of consideration is not now regarded as conclusive evidence of fraud, but raises a question of fact.[38] Whether the contract is executory or executed, the plaintiff may introduce parol evidence to show a mistake or fraud whereby the written contract fails to express the actual agreement, and to prove the actual modification necessary to be made therein, whether such variation consists in limiting the scope of the writing, or in enlarging it so as to embrace land which had been omitted through the mistake or fraud, and

v. Ashworth, 99 Va. 646, 39 S. E Rep. 593; Canon *v.* Farmers' Bank 3 Neb. (Unoff.) 348, 91 N. W. Rep. 585; Casey *v.* Allen, 1 A. K. Marsh. 465; see, also, Chapter L. Inadequacy of price may raise an inference of fraud, or an inference that the parties allowed for a defect, and thus disprove an allegation of fraud. Waldron *v.* Zollikoffer, 3 Iowa, 108.

The well established doctrine seems to be that where there is no actual fraud, and no confidential or fiduciary relations between the parties, mere inadequacy of consideration is not sufficient to avoid a sale, unless it be so great as to shock the moral sense. Pennybacker *v.* Laidley, 33 W. Va. 624, 11 S. E. Rep. 39.

[36] Jenkins *v.* Eldredge, 3 Story, 181; Vint *v.* King, 2 Am. Law Reg. 712; McPherson *v.* Kissee, 239 Mo. 664, 144 S. W. Rep. 410; Perkins *v.* Lyons, 68 Wash. 498, 123 Pac. Rep. 793; Gibb *v.* Mintline, 175 Mich. 626, 141 N. W. Rep. 538; Paul *v.* Swears, 138 App. Div. 638, 122 N. Y. Supp. 740.

[37] Purcell *v.* Miner, 4 Wall. 513, 517; Brown *v.* Hughes, 244 Pa. 397, 90 Atl. Rep. 651; Carlson *v.* O'Connor, 79 Ore. 333, 154 Pac. Rep. 755; Phoenix Pad Mfg. Co. *v.* Roth, 127 Md. 540, 96 Atl. Rep. 762.

[38] Pomeroy Sp. Perf. 274, § 194; Ullsperger *v.* Meyer, 217 Ill. 262, 75 N. E. Rep. 482, 2 L. R. A. N. S. 221, 3 Ann. Cas. 1032; Ward *v.* Albertson, 165 N. C. 218, 81 S. E. Rep. 168; Van Norsdall *v.* Smith, 141 Mich. 355, 104 N. W. Rep. 660; Hamilton *v.* Hamilton, 162 Ind. 430, 70 N. E. Rep. 535.

he may then obtain a specific enforcement of the contract thus varied; and such relief may be granted, although the contract is one which is required by the statute to be in writing.[39] Inadequacy of consideration is relevant, on the question of fraud; and may be so great as to be, alone, satisfactory evidence of fraud.[40] A plaintiff, who fails to establish the contract he has alleged, cannot rely on that alleged in the answer, without adopting it as constituting his case.[41] An optional contract may be proved, but if the time for the exercise of the option is limited, its exercise within that time must be shown.[42] And if personal, it must be exercised by the person entitled thereto.[43]

Plaintiff may prove a claim for damages, if he fails to show a right to specific performance.[44]

11. — Oral Contract Partly Performed.

It is proper to prove the part performance first, as a

[39] Pomeroy Sp. Perf. 347, § 264, and see Beardsley *v.* Duntley, 69 N. Y. 577, 583; Wilson *v.* Van Pelt, 2 Supm. Ct. (T. & C.) 414, and cases cited; Glass *v.* Hulbert, 102 Mass. 24.

[40] Pomeroy Sp. Perf. 270, § 193; Mulligan *v.* Albertz, 103 Wis. 140, 78 N. W. Rep. 1093; Norris *v.* Clark, 72 N. H. 442, 57 Atl. Rep. 334; Van Norsdall *v.* Smith, 141 Mich. 355, 104 N. W. Rep. 660.

[41] Boardman *v.* Davidson, 7 Abb. Pr. N. S. 439.

[42] Codding *v.* Warmsly, 4 Supm. Ct. (T. & C.) 49, s. c., 1 Hun, 585, affi'd in 60 N. Y. 644; Verstine *v.* Yeaney, 210 Pa. 109, 59 Atl. Rep. 689; Dunnaway *v.* Day, 163 Mo. 415, 63 S. W. Rep. 731; Tulton *v.* Messenger, 61 W. Va. 477, 56 S. E. Rep. 830; Laughner *v.* Smith, 232 Ill. 534, 83 N. E. Rep. 1052; Indiana, etc.; Lumber, etc., Co. *v.* Pharr, 82 Ark. 573, 102 S. W. Rep. 686; Hay *v.* Mason, 141 Cal. 722, 73 Pac. Rep. 300.

[43] Mendenhall *v.* Klinck, 51 N. Y. 246.

[44] Ball *v.* White, 150 Pac. Rep. (Okl.) 901; Linthicum *v.* Washington, etc., R. Co. 124 Md. 263, 92 Atl. Rep. 917; McMahon *v.* Plumb, 90 Conn. 281, 96 Atl. Rep. 958; Miller *v.* Smith, 140 Mich. 524, 103 N. W. Rep. 872; Beck *v.* Allison, 56 N. Y. 366, 373, rev'g 4 Daly, 421, s. p., Margraf *v.* Muir, 57 N. Y. 155, 159, and cases cited. As to when may action be retained, to give damages, see Sternberger *v.* McGovern, 56 N. Y. 12, s. c., 15 Abb. Pr. N. S. 257, rev'g 4 Daly, 456. On prayer for performance as to part and deduction of price as to residue, performance as to

foundation for letting in the oral contract.[45] The acts relied on for part performance must be such as to show that some contract existed, that they would not have been done but for the contract, and are not inconsistent with that alleged; and then additional oral evidence of its terms is competent, if the circumstances shown are such that to exclude it would be a fraud upon the plaintiff.[46] Payment of price is not, alone, enough.[47] Change of possession is usually enough,[48] except in case of a gift. The making of improvements is also enough.[49] In case of a gift both together are enough.[50]

To establish part performance, proof to a reasonable certainty is sufficient.[51]

whole cannot be decreed. Boyd *v.* Schlesinger, 59 N. Y. 301.

[44] Pomeroy Sp. Perf. 151, § 107.

[45] McQuitty *v.* Wilhite, 247 Mo. 163, 152 S. W. Rep. 598; Carpenter *v.* Finglaf, 76 N. H. 454, 84 Atl. Rep. 51; Moore *v.* Moore, 72 W. Va. 260, 78 S. E. Rep. 99; Woolley *v.* Stewart, 169 App. Div. 678, 155 N. Y. Supp. 169; Walker *v.* Bohannan, 243 Mo. 119, 147 S. W. Rep. 1024; Miller *v.* Ball, 64 N. Y. 286.

[46] Milholland *v.* Payne, 169 App. Div. 712, 155 N. Y. Supp. 773; Cooper *v.* Colson, 66 N. J. Eq. 328, 58 Atl. Rep. 337, 105 Am. St. Rep. 660, 1 Ann. Cas. 997; Tonseth *v.* Larsen, 69 Ore. 387, 138 Pac. Rep. 1080; Pomeroy Sp. Perf., pp. 159–163, §§ 112–14; Hall *v.* Edwards, 140 Ga. 765, 79 S. E. Rep. 852. *Contra*, Morrill *v.* Cooper, 65 Barb. 512, and cases cited.

[47] Pomeroy Sp. Perf. 104–78, §§ 115–25; and see Beardsley *v.* Duntley, 69 N. Y. 577; Bartz *v.* Paff, 95 Wis. 95, 69 N. W. Rep. 297, 37 L. R. A. 848; Caplan *v.* Buckner, 123 Md. 590, 91 Atl. Rep. 481; Coggswell, etc., Co. *v.* Coggswell (N. J. Ch.), 40 Atl. Rep. 213; Tomsland *v.* Wallace, 39 Wash. 487, 81 Pac. Rep. 1094. *Contra*, Purcell *v.* Miner (4 Wall. 513, 517), requiring also possession.

[48] Pomeroy Sp. Perf. 178–86, §§ 126–32; Williams *v.* Neighbor, 107 Ark. 473, 155 S. W. Rep. 917; Milton *v.* Kite, 114 Va. 256, 76; S. W. Rep. 313; Gove *v.* Armstrong, 88 Vt. 115, 92 Atl. Rep. 10.

[49] Young *v.* Overbaugh, 145 N. Y. 158; Lobdell *v.* Lobdell, 36 N. Y. 327; Neale *v.* Neales, 9 Wall. 1; Messiah Home for Children *v.* Rogers, 161 App. Div. 366, 146 N. Y. Supp. 711, aff'd 212 N. Y. 315, 106 N. E. Rep. 59; Hubbard *v.* Hubbard, 140 Mo. 300, 41 S. W. Rep. 749; Briggs *v.* Briggs, 113 Mich. 371, 71 N. W. Rep. 632; Kinsell *v.* Thomas, 18 Cal. App. 683, 124 Pac. Rep. 220.

[50] Asbury *v.* Hicklin, 181 Mo.

12. — Plaintiff's Title, and Performance.

Plaintiff must show clearly that the purchaser will receive such a title as he contracted for.[52] A title which requires oral evidence to support it may be enough,[53] unless the purchaser stipulated for record title.[54] If the contract was by a trustee, plaintiff must show that it was such as he might properly have made, and as the court would have approved and authorized, had its authority been asked.[55] Good title at the time of trial is sufficient; but defects at the commencement of the action are relevant on the question of interest [56] and costs. Either party may show, by evidence which would be applicable in ejectment, that the vendor has a defective title, or none. It is enough for the purchaser, when sued by the vendor, that there is a reasonable doubt concerning the title, other than a pure question of law, which the court ought to determine.

Strict fulfillment in point of time on the part of the

658, 81 S. W. Rep. 390; Walker *v.* Bohannan, 243 Mo. 119, 147 S. W. Rep. 1024; Neale *v.* Neales, 9 Wall. 1. *Contra*, it must be "indubitable." GRIER, J., in Purcell *v.* Miner, 4 Wall. 513, 517. But see p. 1283 of this vol.

[53] Hinckley *v.* Smith, 51 N. Y. 21, 25; Sherman *v.* Beam, 27 S. D. 218, 130 N. W. Rep. 442; Kohlrepp *v.* Ram, 79 N. J. Eq. 386, 81 Atl. Rep. 1103; Murphy *v.* Fox, 128 App. Div. 534, 112 N. Y. Supp. 819; Eriksen *v.* Whitescarver, 57 Colo. 409, 142 Pac. Rep. 413.

[54] Conley *v.* Finn, 171 Mass. 70, 50 N. E. Rep. 460, 68 Am. St. Rep. 399; Demarest *v.* Friedman, 61 App. Div. 576, 76 N. Y. Supp. 816; Murray *v.* Harway, 56 N. Y. 337, 344. Compare Thorn *v.* Sheil, 15 Abb. Pr. N. S. 81; Lamotte *v.* Steidinger, 266 Ill. 600, 107 N. E. Rep. 850. But, see Cerf *v.* Diner, 210 N. Y. 156, 104 N. E. Rep. 126, reversing 148 App. Div. 150, 132 N. Y. Supp. 1026.

[55] Coray *v.* Matthewson, 7 Lans. 80. See Gwin *v.* Calegaria, 139 Cal. 384, 73 Pac. Rep. 851.

[56] Sherman *v.* Wright, 49 N. Y. 227; Durkin *v.* Connelly, 84 N. J. Eq. 66, 92 Atl. Rep. 906; Repetto *v.* Baylor, 61 N. J. Eq. 501, 48 Atl. Rep. 774.

[56] Jenkins *v.* Fahey, 73 N. Y. 355, rev'g 11 Hun, 351; Monarch Portland Cement Co. *v.* Washburn, 89 Kan. 874, 133 Pac. Rep. 156; Hammer *v.* Westphal, 120 Md. 15, 87 Atl. Rep. 488; Faile *v.* Crawford, 30 App. Div. 536, 52 N. Y. Supp. 353; Heller *v.* McQuin, 261 Ill. 588, 104 N. E. Rep. 158; McNeill *v.* Fuller, 121 N. C. 209, 28 S. E. Rep. 299.

plaintiff, is not in general essential.[57] Unexcused long delay is a bar.[58] A change of circumstances, detrimental to defendant, will not be presumed from the mere fact of delay, but must be proved if relied on.[59] The statutory presumption of payment[60] of a sealed instrument, arising from the lapse of twenty years, is not sufficient evidence of payment.[61]

[57] Davidson *v.* Jersey Company, 71 N. Y. 333, 334, affi'g 6 Hun, 470; Boston, etc., R. Co. *v.* Rose, 194 Mass. 142, 80 N. E. Rep. 498; Gerba *v.* Mitruske, 84 N. J. Eq. 79, 94 Atl. Rep. 34; Hawes *v.* Swansey, 123 Iowa, 51, 98 N. W. Rep. 586.

[58] Finch *v.* Parker, 49 N. Y. 1; Merchants' Bank *v.* Thomson, 55 N. Y. 7, 12; Heydrick *v.* Dickey, 154 Ky. 475, 157 S. W. Rep. 915; Hobbs *v.* Henley, 186 S. W. Rep. (Mo.) 981; Grayson Lumber Co. *v.* Young, 118 Va. 122, 86 S. E. Rep. 826.

[59] Merchants' Bank *v.* Thomson (above).

[60] N. Y. Code Civ. Pro., § 381.

[61] Morey *v.* Farmers' Loan & Trust Co., 14 N. Y. 302. The limitation applicable is not that of actions on sealed contracts. Peters *v.* Delaplaine, 49 N. Y. 362, 372.

CHAPTER L

ACTIONS FOR REFORMATION OR CANCELLATION OF INSTRUMENT

1. Nature of the action.
2. The instrument impeached.
3. Grounds of impeachment.

1. Nature of the Action.

A ground of action substantially of the nature alleged, must be proved.[62] Thus an action to cancel for fraud is not

[62] Eyre *v.* Potter, 15 How. (U. S.) 42; White et al. *v.* White, 95 S. W. Rep. (Tex. Civ. App.), 733; Snodgrass *v.* Knight, 43 W. Va. 294, 27 S. E. Rep. 233; Cobban *v.* Conklin, 208 Fed. Rep. 231, 235, 125 C. C. A. 431.

"It is a rule of equity pleading that every averment necessary to entitle the plaintiff to the relief sought must be set forth in the bill and is not to be supplied by inference. Material facts must be so clearly stated as to be put in issue. A party is not permitted to state one case in a bill and make out a different one by his proofs. Miller *v.* Piatt, 33 Pa. Super. Ct. 547.

"Though the proof may show that complainants are entitled to relief, it can not be granted, unless it is shown that they are entitled to it on the grounds stated in the bill." Simms *v.* Greer, 83 Ala. 263, 266, 3 So. Rep. 423.

"He who alleges fraud must clearly and distinctly prove the fraud he alleges. The burden is on him to prove his case as it is alleged in the bill." Reynolds *v.* Excelsior Coal Co., 100 Ala. 296, 14 So. Rep. 573.

"Neither allegations without proof nor proof without allegations, nor allegations and proof which do not substantially correspond, will entitle complaint to relief unless the defect be remedied by amendment." Luther *v.* Luther, 216 Pa. St. 1, 9, 64 Atl. Rep. 868. See also Summers *v.* Shryock, 46 Pa. Super. Ct. 231.

A plaintiff who would set aside a voluntary settlement must prove his bill substantially as alleged. Taylor *v.* Buttrick, 165 Mass. 547, 43 N. E. Rep. 507, 52 Ann. St. Rep. 530.

Where a party, in seeking to have certain building and loan trust deeds canceled, alleged compliance with the terms and conditions of the obligations, he was not entitled to offer proof of the usurious nature of the loans which the

sustained by evidence of a right to redeem.[63] It is enough that material allegations of fraud are proved, although other allegations of fraud remain unproved;[64] or although

trust deeds secured, since there was no allegation of usury in the complaint. Schell *v.* Equitable Loan, etc., Assoc., 150 Mo. 103, 51 S. W. Rep. 406.

[63] Patterson *v.* Patterson, 1 Robt. 184, s. c., 1 Abb. Pr. N. S. 262. Nor an action to cancel, by proof of a right to specific performance. Fullerton *v.* McCurdy, 55 N. Y. 637.

Likewise if the bill in equity alleges a case of actual fraud whereas only a constructive fraud is proved, there can be no relief granted, Reynolds *v.* Excelsior Coal Co., 100 Ala. 296, 302, 14 So. Rep. 573. Nor will relief be granted, when actual fraud is alleged, on proof of undue influence (Kosturska *v.* Bartkiewicz, 241 Ill. 604, 89 N. E. Rep. 657)—or on proof of mental incapacity to enter into a contractual relation and make a deed. Hines *v.* Horner, 86 Iowa, 594, 53 N. W. Rep. 317,—or by showing a failure of title in the grantor of land. Winter *v.* Bostwick, 212 Fed. Rep. 884, 129 C. C. A. 404.

Where the plaintiff sued to recover a balance due on the purchase price of stock and the defendant by formal counterclaim, on the ground of fraudulent misrepresentation, demanded a rescission of the sale and the return of the amount already advanced it was held that the counterclaim purported to be an action for rescission, and accordingly a precedent restoration was not necessary for its support. See also Delano *v.* Rice, 21 Misc. 714, 48 N. Y. Supp. 130.

[64] Moxon *v.* Payne, L. R. 8 Ch. App. 881, s. c., 7 Moak's Eng. 442.

But the misrepresentation relied upon must be material and a contract will not be rescinded where it appears that the consent thereto would have been given notwithstanding the misrepresentation. Greenwalt *v.* Rogers, 151 Cal. 630, 91 Pac. Rep. 526.

In an action to set aside a deed the plaintiff may allege both mental incapacity and undue influence as the basis for his relief, and it is not a ground for demurrer that the defendant cannot ascertain upon which he will rely. Murphy *v.* Crowley, 140 Cal. 141, 73 Pac. Rep. 820.

When it was proved that a vendor of the plaintiff's property had through fraud secured from her a blank power of attorney which he filled in and thereunder secured and disposed of her property, equity decreed a cancellation of the vendor's deed of conveyance, even though the plaintiff's allegations of fraud and conspiracy were not proved against the vendee. Cobban *v.* Conklin, 208 Fed. Rep. 231, 125 C. C. A. 431.

In an action to cancel a deed, where the gravamen of the bill was fraudulent representations and undue influence, the plaintiff was

there is also a breach of warranty or other wrong on which plaintiff might recover damages.[65]

2. The Instrument Impeached.

Plaintiff may prove the instrument in the usual way,[66] and then proceed to impeach it.[67] Several contracts having together the effect alleged, may be proved under an allegation of one contract.[68]

3. Grounds of Impeachment.

To avoid a contract, it must at least be shown that the minds of the parties never met. To reform the instrument, it must be shown that they did meet on other terms than those embodied in the writing, and that the intention of both was by mistake misrepresented in the writing.[69] The

nevertheless allowed to prove that she had made the deed in question, being misled by a mistaken idea as to the amount of indebtedness which she had assumed, since, even though no fraud was established, there were statements in the complaint sufficiently comprehensve to include mistake. Powell *v.* Plant, 23 So. Rep. (Miss.) 399.

A failure to prove the allegations of fraud in a bill to set aside a sale of land did not prevent the court from passing on the question of inadequacy of price which had also been set out in the bill. Bailor *v.* Daly et al., 7 Mackey (D. C.) 175.

[65] Smith *v.* Babcock, 2 Woodb. & M. 246, and cases cited; Boyce *v.* Grundy, 3 Pet. 210, 219.

Equity will not cancel contracts because of the mere failure of a party to fulfill a promise therein to perform some future act. An exception is recognized, however, where the person making the promise intended at the time not to perform it, thus fraudulently making use of the promise as a device to procure the contract or deed. See Carter *v.* Ware Commn. Co. 46 Tex. Civ. App. 7, 101 S. W. Rep. 524.

[66] See Chapters I, XXVII and XLVIII.

[67] Bunce *v.* Gallagher, 5 Blatchf. 481, 7 Am. L. Reg. N. S. 32.

It seems that a mistake of a conveyancer will not constitute a mutual mistake unless he acted for both parties. Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. Rep. 1099.

[68] Pierce *v.* Wilson, 34 Ala. 596, 607. And under a denial of a contract alleged, defendant may prove other contemporaneous and qualifying contracts. Marsh *v.* Dodge, 66 N. Y. 533, 4 Hun, 278, 6 Supm. Ct. (T. & C.) 568.

[69] The rules of proof for reformation have been already stated. Chapter XXVII, paragraph 19 of this vol. See also Jackson *v.* An-

burden of proof is upon the party alleging the mistake, and the evidence must be convincing and positive that the mis-

drews, 59 N. Y. 244; Mead *v.* Westchester F. Ins. Co., 64 Id. 455; Bush *v.* Hicks, 60 Id. 298, 302, s. c., 2 Supm. Ct. (T. & Co.) 356; Hoag *v.* Owen, 57 Id. 644, affi'g 60 Barb. 34; Boardman *v.* Davidson, 7 Abb. Pr. N. S. 439; Gillespie *v.* Moon, 2 Johns. Ch. 585, 597; Bryce *v.* Lorillard F. Ins. Co., 55 N. Y. 240, s. c., 46 How. Pr. 498, affi'g 35 Super. Ct. (3 J. & S.) 394. As to cogency of proof, see also Fishell. *v.* Bell, Clarke, 37; Phœnix F. Ins. Co. *v.* Gurnee, 1 Paige, 278; Bryce *v.* Lorillard F. Ins. Co., 35 Super. Ct. (3 J. & S.) 394, Pomeroy Sp. Perf. 345, § 261. As to oral evidence that the terms of a trust were fixed under a misapprehension, or failed to express the settlor's intent, see Muloch *v.* Muloch, 9 Reporter, 350, and cases cited.

Equity will reform an instrument on the ground of mistake when the mistake was due not to a misunderstanding of the legal import of the terms of the verbal agreement on which the written instrument was based, but where the mutual ideas of the parties to the agreement were not properly expressed in the written instrument. Wisconsin M. & F. Ins. Co. *v.* Mann, 100 Wis. 596, 76 N. W. Rep. 777.

"The principle is familiar, that in an action to reform an instrument, the complaint should allege mistake, and set forth the agreement as made, and that which the parties intended to make." Kilgore *v.* Redmill, 121 Ala. 485, 25 So. Rep. 766.

A mutual mistake presupposes a prior agreement which should be established and it will be presumed that such prior agreement exhibits the agreement of the parties. Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. Rep. 1099.

To warrant a decree reforming a conveyance on the ground of mistake, there must be definite allegations and corresponding proof as to the prior agreement between the parties, and the true terms thereof should be shown with such certainty that the decree based on the established allegations will substantially carry out the intention of the parties. Keith *v.* Woodruff, 136 Ala. 443, 34 So. Rep. 911.

When an action is brought to reform an instrument on the ground of mistake, the complaint must distinctly show what the true understanding was, point out plainly wherein lay the misunderstanding, and show that the misconception did not occur through gross negligence of the plaintiff. Hughey *v.* Smith, 65 Ore. 323, 133 Pac. Rep. 68.

In an action to reform an insurance policy on the theory of mistake by substituting the plaintiff's name for that of her husband therein, it must be shown that both the plaintiff and the defendant understood and agreed that the plaintiff's name should be

take was made; it is not sufficient that the mistake has been shown by a preponderance of the evidence.[70]

written in the policy; otherwise there was no "*aggregatio mentium* and therefore no contract which (was) capable of reformation." Greditzer *v.* Continental Ins. Co., 91 Mo. App. 534. See also Bancharel *v.* Patterson, 64 Minn. 454, 67 N. W. Rep. 356.

Where a bill sought to reform a contract so as to make it conform to the intention of all parties thereto and to correct a mutual mistake made in the writing, it was held that reformation was proper although the defect might have been aided by parol and so made available, as a defense at law. Merritt *v.* Coffin, 152 Ala. 474, 44 So. Rep. 622.

In an action to correct a mutual mistake in a deed it is unnecessary for the complainant to aver that he was free from negligence where the facts alleged show that no negligence is imputed to him. Peacock *v.* Bethea, 151 Ala. 14, 143 So. Rep. 864.

The plaintiffs stated a cause of action to cancel a contract of insurance by alleging in their bill that the contract agreed upon was not the contract found in the writing and that its substitution for the contract agreed upon was without their knowledge or consent and was procured by fraud and imposition practiced upon them by the defendant's agents. Robertston *v.* Covenant Mut. L. Ins. Co., 123 Mo. App. 238, 100 S. W. Rep. 686.

[70] Fanning *v.* Doan, 139 Mo. 392, 41 S. W. Rep. 742; Moore *v.* Tate, 114 Ala. 582, 21 So. Rep. 820. See Dougherty *v.* Dougherty, 204 Mo. 228, 102 S. W. Rep. 1099.

"The law always presumes, nothing else appearing, that a deed has been correctly written, . . . and it must stand as it was prepared and executed by the parties, unless this presumption of the law is in some way rebutted. In an action to reform a deed, the burden being upon him who seeks to correct it to show by strong and convincing proof and in the clearest and most satisfactory manner that there was a mutual mistake and that the alleged intention of the parties, to which he desires it to be conformed, continued concurrently in the minds of both of them down to the time of its execution, and he must also show precisely the form to which the deed ought to be brought." Warehouse Co. *v.* Ozment, 132 N. C. 839, 845, 44 S. E. Rep. 681. The evidence was held sufficient in this case.

"The testimony must be clear, precise and indubitable, and of such weight and directness as to carry conviction to the mind." See Graham *v.* Carnegie Steel Co., 217 Pa. 34, 66 Atl. Rep. 103.

An alleged mistake must be proved by clear, exact and satisfactory evidence to overcome the presumption that the contract as executed contains the conclusions of the parties and is their final

Fraud cannot be presumed or inferred without proof, in an equitable action, any more than in a common-law action.[71] The evidence of fraud should be clear, decided,

agreement. Kilgore *v.* Redmill, 121 Ala. 485, 25 So. Rep. 766.

To reform an instrument (a bond for title wherein a stipulation excepting the sale of certain timber previously conveyed to a third person was claimed to have been omitted), the evidence must be strong, clear and convincing and it is for the jury, under proper instructions, to decide whether the evidence is of the character required. King *v.* Hobbs, 139 N. C. 170, 51 S. E. Rep. 911.

It must be clearly shown that the mistake was common to both parties. Vamer *v.* Turner, 83 Ark. 131, 102 S. W. Rep. 1111.

In an action to set aside a voluntary settlement, it was held that where the instrument was explained to the plaintiff, and she knew its contents, there was no mistake in a legal sense because its legal effect was not fully understood by her. Taylor *v.* Buttrick, 165 Mass. 547, 43 N. E. Rep. 507, 52 Am. St. Rep. 530.

A clear case must be made out to cancel a note and mortgage on the ground of mistake and a mere preponderance of evidence is insufficient. Scott *v.* Hackfeld & Co., 17 Hawaii, 66. See also Smith *v.* Collins 41 So. Rep. (Ala.), 825.

[71] Hager *v.* Thomson, 1 Black, 80; Warner *v.* Daniels, 1 Woodb. & M. 90, s. c., 9 Law Rep. 160, and cases cited. Compare Gallatian *v.* Cunningham, 8 Cow. 361. Courts of equity have repeatedly refused to sustain actions to set aside deeds for fraud, unless there was proof beyond reasonable doubt. Gould *v.* Gould, 3 Story C. Ct. 516; Phettiplace *v.* Sayles, 4 Mas. 312; Garrow *v.* Davis, 10 N. W. Leg. Obs. 225, and cases cited in last note to paragraph 11 of chapter XLIX; but see, on this subject, chapter XXVI, paragraph 31 and chapter XLIII, paragraph 20 of this vol. For the rules as to the mode of proving fraud and good faith respectively, see chapters XVI, XXXIV and LI. Koebel *v.* Doyle, 256 Ill. 610, 100 N. E. Rep. 154. See also Barnard *v.* Gautz, 140 N. Y. 249, 35 N. E. Rep. 653.

The facts and circumstances which constitute the fraud should be clearly and concisely set forth and with such particularity as will advise the defendant of the nature of the claim. If the allegation of fraud is upon information and belief the facts upon which the belief is predicated should be stated. Murphy *v.* Murphy, 189 Ill. 360, 59 N. E. Rep. 796.

It is not enough to charge fraud in general terms. The facts constituting the fraud must be stated. Bartol *v.* Walton, 92 Fed. Rep. 13.

"In an action to set aside a deed or other contract on the ground that its execution was procured by fraud, undue influence

and satisfactory.[72] It is enough to prove the suppression or misrepresentation of a material fact, though there were

or duress, the complaint must allege the ultimate facts from which such conclusion follows, but it is not necessary to allege mere evidentiary facts by proof of which the ultimate facts are to be established." Thus, where a complaint alleges, in effect, that the grantor was of weak and unsound mind, that the defendants had complete mastery over his mind and property, that he was incompetent to manage himself or his affairs, which facts the defendants well knew, and, taking advantage thereof, they procured from him a deed and transfer of his entire property without any consideration therefor, the allegations are statements of ultimate facts, from which the conclusion follows that the deed and transfer were procured by fraud. Johnson *v.* Velve, 86 Minn. 46, 90 N. W. Rep. 126.

Though there is no direct allegation that a deed was obtained by fraud or undue influence, a complaint "in the absence of a special demurrer is sufficient wherein it is alleged in addition to the facts showing the condition of the deceased, and the circumstances of the transaction—that the defendants, 'fraudulently taking advantage of the incapacity, illness, and weakness of mind of the said Julia Collins, procured her to sign a pretended deed, purporting to convey,' etc., which is substantially an allegation of the procurement of the deed by undue influence." Collins *v.* O'Laverty, 136 Cal. 31, 68 Pac. Rep. 327.

"The burden of proving that a preference is fraudulent is upon the party so charging, and the mere fact that the relationship of parent and child exists between the assignor and the person holding the demand preferred is not a badge of fraud. Business dealings between near kinsmen are to be treated as are the transactions of other people, and, if the good faith thereof be assailed, fraud must be proved." Wilson *v.* Harris, 21 Mont. 374, 54 Pac. Rep. 46.

It has been held, however, that the law will presume fraud, where it is shown that one who occupied a position of trust secured an interest in property for an inadequate consideration, but that in the absence of proof of inadequacy of consideration, there is no such presumption. Geyer *v.* Snyder, 140 N. Y. 394, 35 N. E. Rep. 784.

Damage should be shown. Srader *v.* Srader, 151 Ind. 339, 51 N. E. Rep. 479.

[72] Kansas, &c., Mut. Fire Ins. Co. *v.* Rammelsberg, 58 Kan. 531, 50 Pac. Rep. 446; Detrick *v.* Patterson, 159 Iowa, 460, 141 N. W. Rep. 325; Sellers *v.* Grace, 150 Ala. 181, 43 So. Rep. 716, see also Ohlander *v.* Dexter, 97 Ala. 476, 12 So. Rep. 51.

The misrepresentation must be as to a matter of fact as distinguished from a matter of intention only. Murphy *v.* Murphy, 189

Ill. 360, 59 N. E. Rep. 796; Hardy *v.* Brier, 91 Ind. 91.

But in Matteson *v.* Wagoner, 147 Cal. 739 it was said: "A promise made without any intention of performing it constitutes fraud, and if by means of it a party has been induced to alter his position to his injury it is ground for relief in equity. (Civ. Code, § 1572.) A contract obtained by such means may be rescinded."

"It is rudimentary that fraud need not be proved by direct testimony. Fraud may be shown by the proof of facts from which it may be naturally and reasonably inferred. Fraud, too, may be shown by the proof of isolated facts, sometimes of little significance, standing apart and alone, but when put together in natural relation may furnish indubitable evidence of its existence. . . . The law indulges the presumption of good motives, honesty being a natural attribute of the average man, and, hence, when an act may be as fairly attributed to a proper, as to a bad, motive, the proper motive is presumed to exist." Kilpatrick *v.* Wiley, 197 Mo. 123, 95 S. W. Rep. 213. See also Dexter *v.* McAfee, 163 Ill. 508, 45 N. E. Rep. 115.

"The degree of proof required to rescind or cancel a contract because of fraudulent misrepresentations is more than a mere probability of the truth of the charge of fraud or a mere preponderance of the evidence that such charges are true. . . . In the absence of other inequitable incidents, inadequacy of price is not a sufficient ground for canceling a contract or conveyance, unless it is so gross that it shocks the conscience and furnishes satisfactory and decisive evidence of fraud." Smith *v.* Collins, 148 Ala. 672, 41 So. Rep. 825.

Where, in a suit for the cancellation of a lease of certain oil lands, the defendant in his answer alleged that the lease had been procured by fraud, the burden was upon him to sustain that charge by proof so "clear and cogent" that the mind would be well satisfied that the claim was true. Gillespie *v.* Fulton Oil, etc., Co., 236 Ill. 188, 86 N. E. Rep. 219.

Where fraud is relied on to set aside a contract, the evidence must clearly establish it. Accordingly the plaintiffs could not set aside an option to purchase their land and a deed executed thereunder by claiming that a representation of the party who secured the option was fraudulent when the matter relied on was the mere opinion of the purchaser and facts showing the contrary were easily available to the plaintiffs at the time. Whittaker *v.* Southwest Virginia Impr. Co., 34 W. Va. 217, 12 S. E. Rep. 507.

Fraud may be proved by direct or circumstantial evidence, or both. Proof of circumstances which only raise a suspicion are insufficient. The evidence and circumstances must be of such a character as to clearly establish the fraud. Deepwater Council *v.* Renick, 59 W. Va. 343, 53 S. E. Rep. 552.

no intent to defraud.[73] If the parties to a written agreement stood on equal footing, dealing at arm's length, oral evidence is inadmissible to show that one represented to the other that the agreement would give to him something which by its terms it denied him, unless the latter shows that some part of the contract was omitted by fraud or mistake, which he supposed to have been included at the time of its execution.[74] Knowledge possessed[75] by the

"The right to the rescission or cancellation of a contract because of fraudulent misrepresentations must be established by clear and convincing proof. A court of equity cannot grant such relief upon a probability, nor even upon a mere preponderance of the evidence. The representations themselves, and that they were falsely and fraudulently made, must be clearly established." Howle *v.* North Birmingham Land Co., 95 Ala. 389, 11 So. Rep. 15.

"If the defendant conceded the misrepresentation, and claimed that the plaintiff had full knowledge of the fraud and had therefore acquiesced in or waived it, it might well be argued that the burden of showing the knowledge would rest upon the defendant." Ferguson *v.* Willig, 57 Kan. 453, 46 Pac. Rep. 936.

For an extended list of New York authorities showing the degree of proof required see Southard *v.* Curley, 134 N. Y. 148, 31 N. E. Rep. 330, 30 Am. St. Rep. 642, 16 L. R. A. 561.

[73] Hammond *v.* Pennock, 61 N. Y. 145, 152, affi'g 5 Lans. 358; Smith *v.* Richards, 13 Pet. 26.

A court of equity will not undertake to balance frauds between complainants and defendants, but shuts the doors against those who come without clean hands asking its aid. Clark *v.* Buffalo Hump Min. Co., 122 Fed. Rep. 243, 58 C. C. A. 607.

[74] Jarvis *v.* Palmer, 11 Paige, 650, 658. Compare, for a freer rule, where one had some right to rely on the other, Beardsley *v.* Duntley, 69 N. Y. 577.

But the court did, in an action to reform a deed because of a mistaken dimension written therein, permit one of the parties to the conveyance to state what the real dimension was as contemplated by both parties. Warehouse Co. *v.* Ozment, 132 N. C. 839, 44 S. E. Rep. 681.

Where the writing itself, through mistake, does not express the intention of the parties thereto, oral evidence is admissible to show the real contract. Kee *v.* Davis, 137 Cal. 456, 70 Pac. Rep. 294, 671.

Where the president and secre-

[75] If previous knowledge is relied on, it should be shown to be within a time reasonable for presuming recollection.

attorney or counsel employed by the party,[76] in a particular transaction for his client, is notice to his client, if the client take and profit by the fruits of the transaction.[77] Evidence of diligence in discovering the fraud is not required.[78] Evidence of diligence in rescinding after discovery is required.[79]

tary of a corporation signed a note which was intended as a corporate obligation it was held that oral evidence was admissible to show that they signed through a mistaken idea as to the legal effect of their signatures and that the real intention of the parties was to bind the corporation only. Lee *v.* Percival, 85 Iowa, 639, 52 N. W. Rep. 543.

Where it was the intention of the parties to execute the contract entered into in duplicate and the question at issue was which copy expressed the agreement of the parties (the question arising as but one copy contained an interest clause), it was held that parol evidence was competent for the purpose of showing which of the two papers embodied the real agreement. Under such facts there is no question of reforming an instrument but simply one of identification. Bowman *v.* Poppenberg, 53 Misc. 373, 103 N. Y. Supp. 245.

Parol evidence of a buyer is not admissible to contradict or destroy a deed of sale on the ground of her inattention at the reading of the deed by the notary induced by a request of the vendor not to be attentive to such reading, and especially so when the vendor is dead. Barrow *v.* Grant, 113 La. 291, 36 So. Rep. 970.

Where a party who took stock in a brokerage corporation sought to set aside the transaction and have certain notes which he had given for the stock returned to him, it was held that inasmuch as he had access to the books of the corporation, and was in a position to know and did know the condition of the company's affairs at the time of the purchase, he was bound by everything which a proper investigation would disclose. Newman *v.* Lyman, 165 S. W. Rep. 136, 139 (Tex. Civ. App.).

[76] Otherwise of knowledge on the part of one employed by the agent or correspondent of the party. Hoover *v.* Wise, 91 U. S. (1 Otto) 308, rev'g Hoover *v.* Greenbaum, 61 N. Y. 305, 62 Barb. 188.

[77] May *v.* Le Claire, 11 Wall. 217.

[78] Baker *v.* Lever, 67 N. Y. 304, affi'g 5 Hun, 114.

[79] Matteson *v.* Wagoner, 147 Cal. 739, 82 Pac. Rep. 436; Pinkston *v.* Boykin, 130 Ala. 483, 30 So. Rep. 398. According to Lindsay Petroleum Co. *v.* Hurd, L. R. 5 P. C. 221, s. c., 8 Moak's Eng. 180, if defendant alleges laches in the other party, he must show when

The presumption of law is that the grantor in a deed was sane and competent to execute it at the time of its execu-

the latter acquired knowledge of the truth, and that he knowingly delayed asserting his right.

Failure to rescind a sale of property, claimed to have been induced by fraudulent representations, promptly on the discovery of the fraud was deemed an election to keep the property. Marshall *v.* Gilman, 47 Minn. 131, 49 N. W. Rep. 688.

A purchaser of land must bring his suit for rescission on the ground of fraud promptly after the discovery of the falsity of the representations on which he claims to have relied, since the "fraudulent misrepresentations did not confer upon the defrauded party the speculative advantage of being entitled to wait for the rise and fall in the value of the property." His failure to act promptly raises a presumption of his acquiescence in the validity of the sale. Howle *v.* North Birmingham Land Co., 95 Ala. 389, 11 So. Rep. 15.

In an action to set aside a conveyance of land, it was competent to ask the illiterate negro plaintiff the question, "who told you that the deed conveyed all your interest in the land?" for the purpose of corroborating testimony that he had posted notices repudiating the deed as soon as he learned that the purport of the said instrument was other than had been represented. Hodge *v.* Hudson, 139 N. C. 358, 51 S. E. Rep. 954.

Whether the plaintiff was prompt in rescinding his purchase of stock is a matter for the jury to decide. Mayo *v.* Knowlton, 134 N. Y. 250, 31 N. E. Rep. 985.

It is competent for the plaintiff to offer testimony to explain the delay in commencing the suit and excusing laches. Glover *v.* Radford, 120 Mich. 542, 79 N. W. Rep. 803.

An acquiescence in an agreement for a period of sixteen years, requires some explanation to override the presumption of fair dealing which the plaintiff's long silence raises. Geyer *v.* Snyder, 140 N. Y. 394, 35 N. E. Rep. 784.

Where there was a delay of nearly five years in bringing a suit to set aside an option to purchase and a deed executed under the option, the court held that the plaintiffs were guilty of laches, and said: "Where a party has a right to rescind a contract, on the ground of fraud, he must rescind at once on discovering the fraud, or as soon thereafter as circumstances will permit; for he is not bound to rescind, and any unreasonable delay, especially if it be injurious to the other party, will be regarded as a waiver to his right." Whittaker *v.* Southwest Virginia Impr. Co., 34 W. Va. 217, 230. See other case there cited.

The plaintiff after objecting to the probate of her husband's will, compromised, and on the receipt of a certain sum of money executed certain deeds which she sought to

tion.[80] To rescind an executed contract[81] of an *insane* person, who was apparently of sound mind when the con-

set aside some years thereafter on the ground that she had been induced to compromise in the probate proceedings through a fraudulent misrepresentation as to the value of her husband's estate. The court held that she should have acted promptly on discovering the fraud. Anderson *v.* Smitley, 141 App. Div. 421, 427, 126 N. Y. Supp. 25.

Where it appeared that the plaintiffs were an old couple, living some distance from the town where records were kept, and that they had promptly brought a bill to set aside certain conveyances which they had signed on representations which an examination of the records would have shown were false, they were not guilty of laches, even though over a year had passed since they had signed the conveyances in question. Estate of O'Neill, 90 Wis. 480, 63 N. W. Rep. 1042.

The party should also restore or offer to restore whatever he has received in the transaction so that the parties may be put as nearly as possible *in statu quo*. Srader *v.* Srader, 151 Ind. 339, 51 N. E. Rep. 479; McLeod *v.* McLeod, 137 Ala. 267, 34 So. Rep. 228.

[80] Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. Rep. 201.

"The presumption is universal, and it is not defeated by common report or reputation, or the imputation of friends or relatives, or the old age or feebleness of the subject, or in short by any cause except controlling evidence produced." Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. Rep. 383. See also Ricketts *v.* Jolliff, 62 Miss. 440.

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[81] So, also, according to the best considered recent authorities, of an executory simple contract. Lancaster Co. Bank *v.* Moore, 78 Penn. St. 407, s. c., 21 Am. Rep. 24 (approved in 78 Penn. St. 414). Compare Musselman *v.* Cravens, 47 Ind. 1. The contrary held of a power of attorney and conveyance thereunder. Dexter *v.* Hall, 15 Wall. 9, affi'g Hall *v.* Unger, 2 Abb. U. S. 502. See, also, Van Deusen *v.* Sweet, 51 N. Y. 378. In this case, however, the later English cases, applying the modern equitable rule, are not reviewed. See cases above cited, and Willard Eq. J. Chap. on Fraud; Ordronaux Jud. Aspects of Insan., pp. 300, 306, 309. Lunacy is a shield, not a sword. Allen *v.* Berryhill, 27 Iowa, 534, s. c., 1 Am. Rep. 309. *Imbecility* is not of itself sufficient, but is material in connection with fraud or undue influence or advantage. Johnson *v.* Harmon, 94 U. S. (4 Otto) 371, 379.

A deed may be set aside after the death of the defrauded party if there was no ratification prior to his death. See Rickman *v.* Meier, 213 Ill. 507, 72 N. E. Rep. 1121.

tract was made, if the consideration has been enjoyed and cannot be restored (even though compensation might be awarded), the plaintiff must show fraud, undue advantage or imposition on the part of defendant,[82] or those under

Where a plaintiff sought to cancel a deed on the ground of the mental incompetency of the grantor, the finding against the plaintiff was "entirely justified by the presumption that the grantor was sane and competent at the time he executed the deed until the contrary be shown." Snodgrass *v.* Knight et al., 43 W. Va. 294, 27 S. E. Rep. 233.

The grantor's mind "may be weak and debilitated as compared with what it once was, the memory enfeebled, the understanding weak, the character and demeanor eccentric, and he may not have capacity to transact all the ordinary business of life; still if he understands the nature of the act which he does, recollects the property he is disposing of, and the person to whom he grants it, and how he desires to dispose of it, his act is valid." Buckey *v.* Buckey, 38 W. Va. 168, 174, 18 S. E. Rep. 383. See also Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. Rep. 201, 61 Am. St. R. 788, 18 S. E. Rep. 383; Eakin *v.* Hawkins, 52 W. Va. 124, 43 S. E. Rep. 211; Farnsworth *v.* Noffsinger, 46 W. Va. 410, 33 S. E. Rep. 246; Matter of Wheeler, 5 Misc. 279, 25 N. Y. Supp. 314.

Where a plaintiff in attacking a deed established a feebleness and weakness of intellect only, his evidence was held insufficient to show that the grantor was incompetent to execute the deed. Teter *v.* Teter, 59 W. Va. 449, 53 S. E. Rep. 779.

[82] Young *v.* Stevens, 48 N. H. 133, s. c., 2 Am. Rep. 202; Molton *v.* Camroux, 2 Exch. 487, s. c., 4 Exch. 17, 18, Law Jour. Exch. 356; Elliott *v.* Ince, 7 De G., M. & G. 475–87; Behrens *v.* McKenzie, 23 Iowa, 333, 343; Scanlan *v.* Cobb, 85 Ill. 296; see 1 Story on Contr. 4; 1 Chitty on Contr. 191; Addison on Contr. 140; and see Allore *v.* Jewell, 74 U. S. (4 Otto) 506; Johnson *v.* Harmon, Id. 371.

"Whether a deed . . . executed by an insane person is void, or voidable only, it may be set aside by the insane person after his restoration to sanity, or it may be set aside by a vendee, to whom such insane person conveys the premises, after his restoration to sanity." Clay *v.* Hammond, 199 Ill. 370, 65 N. E. Rep. 352, 93 Am. St. Rep. 146.

"Where it is to the court perfectly plain that one party has overreached the other, and has gained an unjust and undeserved advantage which it would be inequitable and unrighteous to permit him to enforce, we do not believe that a court of equity should hesitate to interfere, even though the victimized parties owe their predicament largely to their own

whom he claims. The burden is on plaintiff to show the insanity.[83] An inquisition had, at the time of or prior to the transaction, is *prima facie* evidence for this purpose.[84]

stupidity and carelessness." Stone *v.* Moddy, 41 Wash. 680, 84 Pac. Rep. 617, 85 Pac. Rep. 346, 5 L. R. A. N. S. 799.

"While it is a general rule that a party endeavoring to avoid an agreement or contract on the ground of fraud should restore to the other party everything he has received in the execution of it, still this is not necessary in case it is impossible to do so by reason of the latter's act in the prosecution of his fraudulent purpose." Ring *v.* Ring, 55 Misc. 420, 105 N. Y. Supp. 498.

[83] Even in case of a deed set up by defendant. Howe *v.* Howe, 99 Mass. 88, 98.

"The burden of proof is on him who asserts insanity, unless a previous condition of insanity has been established." Buckey *v.* Buckey, 38 W. Va. 168, 18 S. E. Rep. 383, quotation taken from an earlier W. Va. case. See also Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. Rep. 201, 67 Am. St. Rep. 788; Eakin *v.* Hawkins, 52 W. Va. 124, 43 S. E. Rep. 211..

Mere weakness of intellect, resulting from sickness or old age, is no ground for setting aside an executed contract, when the party was capable of understanding the nature of the particular business in which he participated. The burden of proving incapacity is, therefore, on the one assailing the act. Trimbo *v.* Trimbo, 47 Minn. 389, 50 N. W. Rep. 350.

Where the plaintiff in an action sought to set aside a deed made by a deceased grantor and sufficiently alleged as grounds therefor the mental incapacity of the grantor and the exercise of undue influence upon him, it was held that there was no rule of pleading which required the plaintiff to elect between these two grounds. A plaintiff may allege two grounds as reasons why a deed should be set aside, and it is not cause of demurrer that the defendant cannot ascertain upon which the plaintiff will rely. Murphy *v.* Crowley, 140 Cal. 141, 73 Pac. Rep. 820.

[84] A deed or mortgage, executed by one who thereafter, by inquisition in proceedings *de lunatrico*, is found to be a lunatic, although made within the period during which he is declared by the finding to have been a lunatic, is not absolutely void; the proceedings are presumptive, not conclusive, evidence of want of capacity, and may be overcome by satisfactory evidence of sanity. Hughes *v.* Jones, 116 N. Y. 67, 22 N. E. Rep. 446.

But the recital in a notary's certificate that a grantor had executed a deed as her free and voluntary act was held not to be evidence of great weight to show that the grantor had been mentally capable of contracting at the time

An inquisition, had on due notice to the subject,[85] and finding that lunacy existed at a certain time or for a specified period,[86] is presumptive evidence of incapacity to contract during that period,[87] and competent against all the world,[88] but is not conclusive evidence of lunacy prior to the day of the finding, against persons not parties to the proceedings, although they had actual notice of their pendency.[89] As to the time after the day of appointment of guardian or committee, it is conclusive.[90] A decree made by a probate court or on appeal from that court, adjudicating the insanity of a testator, is not competent evidence, even between the same parties, on a question of the validity of an act *inter vivos*.[91]

A general or habitual insanity[92] shown to have existed

the acknowledgment was taken. Walker *v.* Shepard, 210 Ill. 100, 71 N. E. Rep. 422.

[85] Without such notice it is absolutely void. Hathaway *v.* Clark, 5 Pick. 490.

[86] Although admitting lucid intervals not specified. Goodell *v.* Harrington, 3 Supm. Ct. (T. & C.) 345. As to the jurisdiction, and the period, see the statute.

[87] And even at a time subsequent thereto. Hoyt *v.* Adee, 3 Lans. 173. *Contra*, Titcomb *v.* Vantyle, 84 Ill. 371, 373.

[88] Hoyt *v.* Adee (above); Goodell *v.* Harrington (above); 2 Whart. Ev., § 1254; Hart *v.* Deamer, 6 Wend. 497. But the petitioner in the lunacy proceedings is not a party to the record in such sense that he is bound by the finding, and precluded from showing that the lunatic was sane, in an action to set aside such a deed or mortgage executed by him. Hughes *v.* Jones, 116 N. Y. 67, 22 N. E. Rep. 446.

[89] Banker *v.* Banker, 63 N. Y. 409; aff'g 4 Hun, 259.

Though the appointment of a guardian for a party found mentally incompetent raised a presumption that the said incompetent was without capacity to make a will, this presumption could not relate back to a time prior to the proceedings which resulted in the guardian's appointment. Spiers *v.* Hendershott, 142 Iowa, 446, 120 N. W. Rep. 1058.

[90] See Gibson *v.* Soper, 6 Gray, 279, 286.

[91] Gray *v.* Thomas, 20 Miss. (12 Smed. & M.) 111; Den *v.* Ayres, 13 N. J. L. (1 Green) 152, 155; Bogardus *v.* Clarke, 4 Paige, 623, affi'g 1 Edw. Ch. 266.

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[92] People *v.* Francis, 38 Cal. 183; Carpenter *v.* Carpenter, 8 Bush (Ky.), 283. So, also, of monomania. Thornton *v.* Appleton, 29 Me. 298. Otherwise of insanity of a temporary character, or shown to result

within a reasonable time before the act it is sought to annul, is presumed to have continued. Proof of insanity (other than idiocy) at a given time does not raise a presump-

Unless the statutes have the effect to make it so.

"Extreme old age, accompanied by loss of memory and will and impaired mental faculties, resulting in an incapacity to transact business or to make a voluntary and intelligent disposition of property, necessarily implies a mental condition incompatible with the ability to make a valid contract." Eagan *v.* Conway, 115 Ga. 130, 41 S. E. Rep. 493.

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from a transient cause. Stewart *v.* Redditt, 3 Md. 67, 81. A general request for an instruction that insanity (unqualified) is presumed to continue, should be refused. Stewart *v.* Redditt, 3 Md. 67, 81.

Ordinarily, "if insanity is found to exist, it is presumed to continue till the opposite is shown." Smith *v.* Smith, 108 N. C. 365, 12 S. E. Rep. 1045, 13 S. E. Rep. 113.

Thus, one who had executed a deed of trust to secure his note during a period between his escape from a lunatic asylum and his return to the institution was presumed incapacitated at the time he executed the instrument. Ricketts *v.* Joliff, 62 Miss. 440.

Though the grantor was adjudged to be insane subsequently to the execution of the deed the validity of which the plaintiffs questioned, a failure to appoint a guardian *ad litem* to defend the action brought by the plaintiffs after the said adjudication was fatal to the decree, since the presumption is that a person declared insane continues in that state. Eakin *v.* Hawkins, 52 W. Va. 124, 43 S. E. Rep. 211.

Evidence that the wife of the grantor of a deed had been "buffetted about" in different insane asylums for years prior and subsequent to the execution of the said deed, when coupled with the testimony of the notary who took the acknowledgments that he had never seen the grantor's wife was held sufficient to set aside the conveyance, in so far as it affected the dower right of the wife on the ground of forgery. Rosenberg *v.* Haggerty, 141 App. Div. 73, 126 N. Y. Supp. 979.

In an action to set aside a deed on the grounds of imposition and fraud, a complaint alleging that some years before the transaction the plaintiff received a blow on the head which mashed his skull and produced partial paralysis and impaired his mental faculties and that his unfortunate condition was known to his brothers who obtained the deed from him, is sufficient to sustain the conclusion that the plaintiff was overreached and to support a judgment for the relief sought. Combs *v.* Combs, 65 S. W. Rep. 13, 23 Ky. L. 1264.

tion, and is not alone competent evidence, that the person was insane at a prior date.[93] A party who would take advantage of a lucid interval, must prove the interval.[94] But

[93] Terry *v.* Buffington, 11 Geo. 342, cited in Ewell's Cases, 718. The competency of the state of mind after the transaction, depends on remoteness, and is somewhat in the discretion of the judge. White *v.* Graves, 107 Mass. 325, s. c., Am. Rep. 38. And when it has been received from one side may be received from the other within reasonably similar limits. Walker *v.* Clay, 21 Ala. 797, 806.

When a party executed a note and a mortgage as security therefor and thereafter a judgment of interdiction was secured and duly published, a subsequent purchaser of the note was not affected by the interdiction of the maker in the absence of proof that the cause of the interdiction notoriously existed at the time the note was executed. Wolf *v.* Edwards, 106 La. 477, 31 So. Rep. 58.

Where a grantor was adjudged, about fourteen months after he had executed a deed, to be insane, this adjudication did not concern the grantor's state of mind at the time of executing the deed. Eakin *v.* Hawkins, 52 W. Va. 124, 129, 43 S. E. Rep. 211.

Where, in an action to set aside a deed, it was shown by doctors who had examined the grantor several days prior to and on the day after the execution of the deed that the said grantor was of unsound mind, but by the testimony of the attorney who drew up the deed it was established that at the time of the making the deed the grantor knew the quality of his act, the court on appeal refused to disturb the decree of the court below in favor of the grantees. Snider *v.* Wilson, 78 N. W. Rep. (Iowa) 802.

[94] Cartwright *v.* Cartwright, 1 Phillimore, 90, 100, and see Ewell's cases, 716, and cases cited.

"Whoever relies on a lucid interval to support a contract subsequently made with such lunatic must prove it and show sanity and competence at the time the contract was made, . . . The evidence in support of a lucid interval, after derangement has been established, should be as strong and demonstrative of such fact as when the object of the proof is to show insanity." Ricketts *v.* Jolliff, 62 Miss. 440.

The burden of proving a lucid interval in which a will was made rested upon the proponents where it had been shown that for some time prior to the making of the will the testator had been permanently affected so as to be unable to perform such an act. In re Knox's Will, 123 Iowa, 24, 98 N. W. Rep. 468.

Where, however, a lucid interval has been established on the part of the grantor who was insane a short time prior to his execution of a deed, it then rested with the one claiming insanity to show a return

he is not bound to prove as perfect a state of mind as existed before the insanity.[95] It is enough to show a disposing mind.[96] The existence of a lucid interval may be inferred from the beneficial and advantageous character of the contract.[97]

Lay witnesses cannot properly give an opinion as to the mental capacity of a grantor; but they may state the impressions which the acts and declarations of the party, to which they have testified, produced upon their minds at the time, and as to whether they were rational or irrational.[98]

to that mental state at the time in question. Wright *v.* Jackson, 59 Wis. 569, 18 N. W. Rep. 486.

[95] Dicken *v.* Johnson, 7 Ga. 488, and cases cited.

"The discharge of a patient from a lunatic asylum may be regarded as evidence of his recovery." Clay *v.* Hammond, 199 Ill. 370, 65 N. E. Rep. 352, 93 Am. St. Rep. 146.

[96] *Ex p.* Holyland, 11 Ves. 10; Atty.-Gen *v.* Parnther, 3 Brown's Ch. 441, s. c., Ewell's Cases, 691, and see Lilly *v.* Waggoner, 27 Ill. 395, 399.

[97] Addison on Contr. 140.

A deed made by an insane person during a lucid period (1872–1896), cannot be successfully attacked on the ground of insanity where the only proof offered in support of the attack was of facts and circumstances which existed during the admitted periods of the grantor's insanity without any evidence of his state of mind during the said lucid period. Ramsdell *v.* Ramsdell, 128 Mich. 110, 87 N. W. Rep. 81.

[98] Holcomb *v.* Holcomb, 95 N. Y. 316, 321; Paine *v.* Aldrich, 133 N. Y. 547; People *v.* Straight, 148 N. Y. 569; People *v.* Youngs, 151 N. Y. 219; People *v.* Koerner, 154 N. Y. 355; Wyse *v.* Wyse, 155 N. Y. 367, 371, 49 N. E. Rep. 942. Compare De Witt *v.* Barly, 17 N. Y. 340, limiting a previous decision in 9 Id. 371; Pelamourges *v.* Clark, 9 Iowa, 14. And see, to same effect, Stuckey *v.* Bellah, 41 Ala. 700, 707; Walker *v.* Walker, 14 Geo. 242; Doe *v.* Reagan, 5 Blackf. 217; Stewart *v.* Speddon, 5 Md. 433, 446; Dickenson *v.* Barber, 9 Mass. 225; McDougald *v.* McLean, 1 Winst. 120; Aiman *v.* Stout, 42 Penn. St. 114; Morse *v.* Crawford, 17 Vt. 499. The rule as to the testimony of experts is stated at p. 148 of this vol. Upon principles already stated (p. 146) declarations of the grantor are competent to show his state of mind (Howe *v.* Howe, 99 Mass. 88; Howell *v.* Howell, 47 Geo. 492), except declarations made after the act and offered to impeach it, for this might sanction fraud. Stewart *v.* Redditt, 3 Md. 67. As to allowing personal inspection by the court or jury, see Beaubien *v.* Cicotte, 12 Mich. 459. At the hearing on a bill in equity to set aside a deed alleged to have

To rescind for *intoxication*, plaintiff must show that, as matter of fact, the intoxication, however produced, was

been obtained by fraud and misrepresentation from a woman advanced in years incapacitated from attending to business, a witness who has known the grantor all her life may be asked to show her mental condition at the time of the execution of the deed as compared with her mental condition when appearing in court, "State whether the plaintiff has failed or has not failed in her mental capacity during the past five years." Clark *v.* Clark, 168 Mass. 523, 47 N. E. Rep. 510. The grantor's prior declarations as to his disposition of his property, inconsistent with the tenor of the deed, are competent. Anderson *v.* Carter, 24 N. Y. App. Div. 462. The evidence of an officer taking the acknowledgment to a deed, or of a person present at its execution, is entitled to peculiar weight, in considering the grantor's capacity. Delaplain *v.* Grubb, 44 W. Va. 612, 30 S. E. Rep. 201.

"It is the settled law of Michigan that an opinion that a testator was incompetent can only be given when the witness has testified to circumstances upon which it is predicated, and which to some extent justify it. . . . The extent to which such proof must go cannot be limited by an inflexible rule. It must depend upon the familiarity of the witness with the testator, the character of the disqualification, the nature and number of the extraordinary circumstances detailed, and proximity to the act involved in the point of time." O'Connor *v.* Madison, 98 Mich. 183, 57 N. W. Rep. 105. Cited in Ramsdell *v.* Ramsdell, 128 Mich. 110, 115, 87 N. W. Rep. 81, which held that the opinion of a witness as to incompetency is of no value in the absence of facts to support it.

"The rule is that non-expert opinion of mental unsoundness must be based strictly upon facts and circumstances which are first detailed by the witness." Spiers *v.* Hendershott, 142 Iowa, 446, 120 N. W. Rep. 1058.

The opinion of non-expert witnesses has frequently been declared a very unsatisfactory kind of evidence to show incompetency. Teter *v.* Teter, 59 W. Va. 449, 53 S. E. Rep. 779.

A non-expert witness, however, was permitted to state that he believed that a testatrix who had been stricken with paralysis had sufficient mental capacity to make a will, and in order to show his experience in observing people so stricken, he was allowed to give his observation as to the mental condition of his father who had for years suffered a similar affliction. Moffitt *v.* Smith, et al., 153 N. C. 292, 69 S. E. Rep. 224.

Questions relating to the mental condition of a testator when put to non-expert witnesses, should be so framed as to call for facts and not opinions, since lay witnesses cannot testify as to their opinions as to a party's sanity or insanity.

such as to suspend or destroy the power of intelligent assent;[99] and that the consideration has been restored.[1]

To rescind on the ground of *infancy*, the burden is on

Thus the question, "From these facts . . . what did you infer in your own mind as to Mr. Jordan's mental capacity?" was properly excluded as calling for an opinion. But the questions, "Whether you noticed any failure of memory?" "Did you ever notice anything to indicate that he was not of sound mind?" were competent because they directed the attention of the witness to what he had noticed of external manifestations of Mr. Jordan's mental condition. When, however, witnesses were asked about their observations as to the testator's mental grasp, coherency, intelligence, etc., their answers, "His powers seemed to be complete and perfect," "I should say he was in possession of clear faculties and mental powers," were clearly not responsive, being expressions of pure opinion and were erroneously admitted. McCoy *v.* Jordan, 184 Mass. 575, 69 N. E. Rep. 358.

Similarly, non-experts are not permitted to give their opinion in regard to the sanity of one whose mental condition is drawn in question." Gorham *v.* Moor, 197 Mass. 522, 523, 84 N. E. Rep. 436.

The testimony of a notary who took the grantor's acknowledgment as to the competency of the latter to execute the deed in question was held to be entitled to peculiar weight. Buckley *v.* Buckley, 38 W. Va. 168, 175, 18 S. E. Rep. 383. See also Farnsworth *v.* Noffsinger, 46 W. Va. 410, 33 S. E. Rep. 246.

Details of a conversation between a testator and the attorney who drafted his will were competent on the question of the testator's mental capacity when offered by the attorney acting as a witness. In re Knox, 123 Iowa, 24, 98 N. W. Rep. 468.

The opinion of a subscribing witness to a will as to the mental capacity of a testatrix is admissible. Spiers *v.* Hendershott, 142 Iowa, 446, 120 N. W. Rep. 1058.

[99] Johnson *v.* Harmon, 94 U. S. (4 Otto) 371, 380, 1 MacA. 139, and see Johns *v.* Fritchie, 39 Md. 258; Murray *v.* Carlin, 67 Ill. 286. As to the mode of proving intoxication, see chapter LVI.

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[1] Joest *v.* Williams, 42 Ind. 565.

The reply to an answer setting up a general release executed by the plaintiff's intestate alleged a repudiation of the said release on the ground that the intestate was at the time of its execution under the influence of drugs and opiates. It was held that since the reply disclosed a contract merely voidable, it was demurrable in the absence of an offer to return the money which had been received by the testator under the release. Birmingham R., etc., Co. *v.* Hinton, 158 Ala. 470, 48 So. Rep. 546.

plaintiff to prove his age; [2] and in case of an executed transfer, the proper acts of disaffirmance on his part.[3] Confirmation may be proved by slighter evidence than disaffirmance.[4] Mere acquiescence is not of itself sufficient evidence of confirmation, but evidence showing clearly and unequivocally an intent to affirm is enough.

Where a *fiduciary relation* [5] is shown, the burden is on the

It must appear that the party was in such a condition that he was incapable of understanding the nature of the transaction in which he was engaged. Watson *v.* Doyle, 130 Ill. 415, 22 N. E. Rep. 613.

Where intoxication was alleged as the ground for cancellation of a deed, it was held that evidence of partial intoxication was insufficient and that it must be established that the grantor, at the time he executed the deed, was influenced to such a degree as to impair his judgment and capacity to look after his own interests. Oakley *v.* Shelley, 129 Ala. 467, 29 So. Rep. 385. Likewise as to drugs and opiates. Birmingham R., etc., Co. *v.* Hinton, 158 Ala. 470, 48 So. Rep. 546.

Though by inquisition a party has been found to be a habitual drunkard, he has been, nevertheless, held competent to receive money discharging his debtor, when it was established that he had carried on his business after the inquisition in the same manner as before. Black's Est., 132 Pa. 134, 19 Atl. Rep. 31.

[2] Compare Roof *v.* Stafford, 7 Cow. 179, 183; Gray *v.* Lessington, 2 Bosw. 257; Irvine *v.* Irvine, 5 Minn. 61. For mode of proof of age, see Chapter V.

Where, in an action on a note, the defense of infancy was offered, the party asserting such incapacity assumed the affirmative at the trial to prove his special plea by a preponderance of the evidence. Goodwine *v.* Acton, 97 Ill. App. 11.

[3] Vorrhies *v.* Voorhies, 24 Barb. 150. Compare Miles *v.* Lingerman, 24 Ind. 385.

[4] Irvine *v.* Irvine, 9 Wall. 617, affi'g 5 Minn. 61. See *Infancy*, as a defense.

[5] Such as attorney and client (Bowen *v.* Bulkley, 14 N. J. Eq. 451, 458; Mason *v.* Ring, 3 Abb. Ct. App. Dec. 210; Widgery *v.* Tepper, 38 L. T. R. N. S. 436), principal and agent (Brooks *v.* Martin, 2 Wall. 70, 85; Eldridge *v.* Jenkins, 3 Story, 181), trustee and *cestui que trust* (Davoue *v.* Fanning, 2 Johns. Ch. 252, 260; Michoud *v.* Girod, 4 How. U. S. 544, 553, Gilman, &c. R. R. Co. *v.* Kelly, 77 Ill. 426), corporation and officer (Cumberland Coal Co. *v.* Sherman, 30 Barb. 553; The Same *v.* Parrish, 42 Md. 598), and the same rule is applied to some extent in the case of a conveyance by a child just of age to a parent (compare Turner *v.* Collins, L. R.

trustee or other person owing the duty, to repel the presumption of fraud.[6] A witness cannot be allowed to testify directly to the question whether defendant had undue influence.[7]

7 Chan. App. 329, s. c., 2 Moak's Eng. 290, with Taylor *v.* Taylor, 8 How. U. S. 183; Jenkins *v.* Pye, 12 Pet. 241), or a conveyance by an aged parent to one of several children (Lansing *v.* Russell, 3 Barb. Ch. 325; Siemon *v.* Wilson, 3 Edw. Ch. 36), and to those who who deal with expectant heirs and reversioners (Earl of Aylesford *v.* Morris, L. R. 8 Ch. App. 484, s. c., 6 Moak's Eng. 443, compare Parmalee *v.* Cameron, 41 N. Y. 392).

When an aged person, living with his daughter who stood in a position of trust and confidence towards him, conveyed, without consideration and under circumstances of secrecy, his entire property to her to the exclusion of the children of his deceased son, she had the burden of offering evidence sufficient to overcome the presumption of undue influence and fraud. Doyle *v.* Welch, 100 Wis. 24, 75 N. W. Rep. 400.

[6] See Lewin on Trusts, 615, 858, Declarations of the grantee that he took the grant for the grantor's benefit are admissible, not as proving a trust by parol, but as proving the pretended and the real intent. Platt *v.* Platt, 58 N. Y. 646, affi'g 2 Supm. Ct. (T. & C.) 25. See also Barnard *v.* Gantz, 140 N. Y. 249, 35 N. E. Rep. 430.

The existence of the fiduciary relation raises a presumption of fraud. Way *v.* Union Cent. L. Ins. Co., 61 S. C. 501, 39 S. E. Rep. 42.

It is a "universal rule" that a party who has benefited by a will or a voluntary deed and has had a controlling agency in procuring its execution will be regarded with suspicion. This is especially true where there has been a confidential relation between the grantor or testator and the beneficiary. Disch *v.* Timm, 101 Wis. 179, 77 N. W. Rep. 196.

"If confidential or fiducial relations between the parties are shown to have existed at the time, the burden then falls upon the grantee to show that the transaction was free from fraud or overreaching made possible because of such relation." Detrick *v.* Patterson, 159 Iowa, 460, 141 N. W. Rep. 325.

[7] Dean *v.* Fuller, 40 Penn. St. 474, 478. See also Gorham *v.* Moor, 197 Mass. 522, 84 N. E. Rep. 436. For the rule as to prove of undue influence, and of weakness of mind, see chapter V, paragraphs 65–70 of this vol.

CHAPTER LI

ACTIONS BY JUDGMENT CREDITORS

1. Judgment.
2. Execution.
3. Indebtedness to plaintiff.
4. Fraud.
5. The consideration.
6. Indebtedness to other creditors.
7. Voluntary settlement.
8. Intention of the debtor.
9. — of his grantee.
10. Admissions and declarations.
11. *Defense.*
12. — evidence of consideration.

1. Judgment.

The mode of proving the judgment has been already stated.[8] Docketing need not be shown,[9] unless execution or a lien is to be proved, or the judgment was in a justice's or district court.

2. Execution.

The execution, with the sheriff's return and the date of filing endorsed thereon, is the primary evidence of its issue and return,[10] and, together with testimony of a witness that

[8] Chapter XXIX. Judgment on attachment without personal service (Thomas *v.* Merchants' Bank, 9 Paige, 216; compare Clarke, 234, 286), or an interlocutory decree not finally determining the question of liability (Public Works *v.* Columbia Coll., 17 Wall. 521, 530), is not enough.

[9] Youngs *v.* Morrison, 10 Paige, 325.

But where the action is to set aside a conveyance of land as fraudulent, the judgment creditor does not show that he has exhausted his legal remedies if it appears that the judgment was docketed in a county other than that in which the property is situated. West Troy Nat. Bank *v.* Levy, 17 N. Y. State Rep. 529.

Under the Iowa statute it has been held that the filing of a transcript of a superior court judgment in the district court makes the judgment a district court judgment which cannot be proved by a certificate of the clerk of the superior court. There should be evidence of the docketing in the district court. Peterson *v.* Gittings, 107 Iowa, 306, 77 N. W. Rep. 1056.

[10] Jones *v.* Green, 1 Wall. 330; Stahl *v.* Stahl, 2 Lans. 60; Mc-

he had seen it on file in the clerk's office, is sufficient.[11] The residence of the debtor in the country where execution was issued may be inferred from circumstances.[12] Return before the expiration of sixty days, though made on plaintiff's request, is *prima facie* sufficient.[13]

Elwain *v.* Willis, 9 Wend. 548, affi'g 3 Paige, 505. Lost execution may be proved by an alias, endorsed and filed pursuant to leave of court. Bradford *v.* Read, 2 Sandf. Ch. 163. The issuing of an execution may be proved by entries in the handwriting of the attorneys recovering the judgment, on which it is claimed to have been issued, contained in their register, where the loss of the execution is established, and the attorneys are both dead. Church *v.* Hempsted, 27 N. Y. App. Div. 412.

Although a sheriff's return *nulla bona* was informal because it was not sworn to or made to a regular term of court, it was nevertheless not insufficient. Newberry Nat. Bank *v.* Kinard, 28 S. C. 101, 5 S. E. Rep. 464.

In an action to recover the balance due on a judgment, the defendant cannot give evidence to prove that the sheriff seized sufficient property upon the writ in the original action to pay the whole judgment, since the sheriff's taking enough property out of which to realize the full amount of the judgment does not satisfy the judgment unless the amount is paid to the creditor. Smith *v.* Condon, 174 Mass. 550, 55 N. E. Rep. 324, 75 Am. St. Rep. 372.

[11] Meyer *v.* Mohr, 1 Robt. 333, s. c., 10 Abb. Pr. 299. A proper return of an execution *nulla bona*, issued upon a valid judgment, is *prima facie* evidence of the insolvency of the maker. Walley *v.* Deseret Nat. Bank, 14 Utah, 305, 47 Pac. Rep. 147.

In Bellows *v.* Sowles, 71 Vt. 214, 44 Atl. Rep. 68, the testimony of the clerk was held admissible to identify an alias execution.

A certified copy of the record of the judgment is admissible. Day *v.* Crosby, 173 Mass. 433, 53 N. E. Rep. 880.

[12] Such as the facts that the other parties resided there, and that the contract was made, for a long time performed, and finally sued on, in that county. Fox *v.* Moyer, 54 N. Y. 125.

Service of a non-resident without the state of course gives the court no jurisdiction to render a personal judgment, and a judgment on such service is void. Richardson *v.* Richardson, 134 Iowa, 242, 111 N. W. Rep. 934.

[13] Illinois Malleable Iron Co. *v.* Graham, 55 Ill. App. 266.

A return of an execution by a sheriff, before the expiration of the statutory time is sufficient to sustain a judgment creditor's action if the sheriff has taken all the necessary and proper steps to col-

3. Indebtedness to Plaintiff.

The plaintiff's judgment, unless recovered by confession,[14] is, both as against the judgment debtor and as against his grantees (even grantees by conveyances prior to the judgment), conclusive evidence of the existence and the amount of the indebtedness established thereby,[15] unless fraud or

lect the execution and has found no property on which to levy. Under such circumstances a request by the judgment creditor's attorney to make the return is immaterial, for the sheriff's act is one for which he alone is responsible. Howe *v.* Babcock, 72 Ill. App. 68.

A judgment creditor's action was held not to have been prematurely commenced where it was shown that it was not started till after the return of the execution, even though only six days had elapsed between the time of issuance of the execution and the institution of the action. Knauth *v.* Bassett, 34 Barb. (N. Y.) 31; Forbes *v.* Waller, 35 N. Y. 430, s. c., as Forbes *v.* Walter, 25 How. Pr. 166, affi'g Forbes *v.* Logan, 4 Bosw. 475; Renaud *v.* O'Brien, 35 N. Y. 99, rev'g 25 How. Pr. 67. But, where return is necessary, it must have been made before the commencement of the present action. McCullough *v.* Colby, 5 Bosw. 477, compare 4 Id. 603.

[14] Botts *v.* Cozine, Hoff. Ch. 79. But see Magniac *v.* Thompson, 1 Baldw. 344, affi'd in 7 Pet. 348.

Where it appeared that the vendor of property had remained in possession until his death, asserting ownership by the collection of rents and the presumptive use thereof, the court held that the facts presented such a *prima facie* case of fraudulent combination between the vendor and vendee that the declarations of the vendor to the effect that he had made the sale to defraud certain of his creditors were competent. Byrd *v.* Jones, 84 Ala. 366, 4 So. Rep. 375.

[15] Candee *v.* Lord, 2 N. Y. 269; Burgess *v.* Simonson, 45 N. Y. 225; Ludington's Petition, 5 Abb. New Cas. 307, and cases cited.

A "short copy" of a judgment with the word "test" at the bottom thereof, signed by the clerk and with the seal of his office attached thereto, is a sufficient form of authentication under the Maryland Code, and this "short copy" is admissible as *prima facie* evidence of indebtedness. Mayfield *v.* Kilgur, 31 Md. 240.

A judgment recovered in an action for personal injuries has been held to be a debt which the administrator of the judgment creditor could proceed to collect, and the defendant could not plead as a bar to the administrator's proceedings the rule that a cause of action in tort does not survive the party injured, since a judgment, once recovered, is in the nature of a con-

collusion appears. It is not conclusive, except as to matters which appear to have been litigated and intelligently determined, or established by a default, in a court of competent jurisdiction; and even then may be impeached for fraud or collusion.[16] Defendants have the burden of proving payment of a judgment alleged in the complaint to be due and unpaid at the commencement of the action.[17]

tract obligation. Anniston *v.* Hurd, Adm., 140 Ala. 394, 37 So. Rep. 220, 103 Am. St. Rep. 45.

Where the rendition of a judgment is shown, it will be presumed to be still in effect. Kedey *v.* Petty, 153 Ind. 179, 54 N. E. Rep. 798.

[16] Same cases. The competency of a judgment against the debtor's personal representative is stated in Chapter V. To prove an indebtedness on the part of a judgment debtor, and as of the day of its rendition, the judgment of a court of competent jurisdiction is admissible in evidence in a subsequent action between other parties. It is competent evidence of its own existence and of its legal effects for and against strangers as well as for and against parties and privies. Of course, it may be impeached by strangers on the ground of fraud and collusion, and perhaps on other grounds. Pabst Brewing Company *v.* Jensen, 68 Minn. 293, 71 N. W. Rep. 384.

A grantee or donee, not being privy to the judgment on which an action to set aside a conveyance is based, may attack the judgment for want of jurisdiction, or on the ground that it was obtained through fraud or collusion. Lawson *v.* Alabama Warehouse Co., 73 Ala. 289.

A default judgment induced by fraud of the plaintiff cannot be made the basis of an action to set aside a conveyance as fraudulent. Richardson *v.* Trimble, 38 Hun, 409.

[17] Pierce *v.* Hower, 142 Ind. 626, 42 N. E. Rep. 223; O'Brien *v.* Stambach, 101 Iowa, 40, 69 N. W. Rep. 1133; Walker *v.* O'Neil Mfg. Co., 128 Ga. 831, 58 S. E. Rep. 475, 63 Am. St. Rep. 411.

"A party pleading a judgment is not bound to allege, in addition to the statement of its recovery or rendition, that it still remains in full force, etc., because when rendered it is presumed to remain in force, until the contrary appears." Murphy *v.* Citizens' Bank, 82 Ark. 131, 100 S. W. Rep. 894, 11 L. R. A. N. S. 616, 12 Ann. Cas. 535.

"It is true that the lien of a judgment obtained against a decedent in his lifetime is said to continue indefinitely against his heirs and devisees, but by this it is not meant that the general presumption of payment does not rise even in such case after twenty years." Roberts *v.* Powell, 210 Pa. 594, 60 Atl. Rep. 258.

If the indebtedness is not established by judgment, its nature and existence must be shown by other evidence.[18]

4. Fraud.

The burden is on the plaintiff to show fraud,[19] clearly.[20]

Where the judgment was recovered in 1875 and an action was instituted thereon in 1880 and a motion for a new trial after being allowed to lie dormant for 15 years was taken up in 1903 and granted, the presumption that a judgment of long standing has been paid does not exist, since the granting of the new trial restored the case to its original situation. St. Francis Mill Co. *v.* Sugg, 206 Mo. 148, 104 S. W. 45. Rep.

There is a rebuttable presumption that a judgment of more than 20 years standing has been paid. Maxwell *v.* De Valinger, 18 Del. 504, 47 Atl. Rep. 381.

There is a presumption, which may be rebutted, that a judgment entered 14 years prior to the proceeding to revive it, without the issuance of an execution, has been paid. Wittstruck *v.* Temple, 58 Neb. 16, 78 N. W. Rep. 456.

Where the statute of limitations does not bar a judgment, the presumption of its payment does not, as a matter of law, arise within the statutory period, though the lapse of time may be relied on as some evidence of payment. Cheathan *v.* Aistrop, 97 Va. 457, 34 S. E. Rep. 57.

[18] Elwell *v.* Johnson, 3 Hun, 558.

If the plaintiff's judgment is subsequent in time to the conveyance which he wishes to impeach as voluntary and without consideration, there must be other evidence than that afforded by the judgment itself to show that the debt existed at the time the conveyance was made. But where it is tainted with fraud, being made to delay existing creditors, it is void and it seems that the judgment itself may be sufficient to establish the right of the creditors to attach the conveyance. Lawson *v.* Alabama Warehouse Co., 73 Ala. 289.

A surety is an existing creditor as against a co-surety from the date of the execution of the bond and can claim protection against any fraudulent transfer of property which his co-surety may make. Washington *v.* Norwood, 128 Ala. 383, 30 So. Rep. 405.

A complaint in an action on a judgment states facts sufficient to constitute a cause of action where it describes the court in which the alleged judgment was rendered, the place where it was held, the names of the parties, the date at which it was entered, and the amount of the judgment. Ewing *v.* Jennings, 15 Nev. 379.

[19] Loeschigk *v.* Hatfield, 5 Robt. 26, s. c., as Loeschigk *v.* Addison,

[20] Townsend *v.* Stearns, 32 N. Y. 209; Farmers' Bank *v.* Worthington, 145 Mo. 91, 46 S. W. Rep. 745. The person assailing the

4 Abb. Pr. N. S. 210, affi'd in 51 N. Y. 660. A mere right of priority, without evidence of fraud, is not enough. Skinner *v.* Stuart, 15 Abb. Pr. 391, s. c., 39 Barb. 206, 24 How. Pr. 489, rev'g 13 Abb. Pr. 442. Compare Shaw *v.* Dwight, 27 N. Y. 244.

"It is well settled that a simple contract creditor cannot attack, as fraudulent, the transfer by his debtor of property applicable to the payment of the debt until after the recovery of judgment, the issue and levy of an execution, or its return unsatisfied." Kraemer *v.* Williams, 131 App. Div. 236, 115 N. Y. Supp. 721.

The plaintiff by a bill of sale took goods of his debtor in satisfaction of his claim. Subsequently other creditors of the vendor levied on the goods and the plaintiff brought an action in replevin. The defendants claimed that the sale to the plaintiff was fraudulent. The plaintiff produced evidence clearly showing his good faith, whereas the defendants failed to prove that the plaintiff had any knowledge of his debtor's insolvency or to establish inadequacy of consideration for the sale to the plaintiff. The court held that no fraud was proved and quoted from Jaeger *v.* Kelley, 52 N. Y. 274: "Nor is the vendor's fraudulent intent sufficient. The vendee must be implicated. . . . It is not enough to create a suspicion of wrong, nor should a jury be permitted to guess at the truth." The court further quoted from Bernheimer *v.* Rindskopf, 116 N. Y. 428, 22 N. E. Rep. 1074, 15 Am. St. Rep. 414: "Fraud cannot be presumed. It must be proven, and if there is left room for the inference of an honest intent, the proof of fraud is wanting." Fisher *v.* Stout, 74 App. Div. 97, 77 N. Y. Supp. 945.

But see in this connection, Teague *v.* Bass, 131 Ala. 422, 31 So. Rep. 4.

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conveyance assumes the burden of showing that it was executed in bad faith and left the grantor insolvent and without ample property to pay his existing debts and liabilities. Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. Rep. 105. The weight of opinion is that it need not be shown beyond reasonable doubt, but the presumption of innocence should be weighed with the testimony. See chapter XXVI, paragraph 31 of this vol. and cases cited in paragraph 12 of chapter XLIX and paragraph 3 of chapter L. The only available grounds of relief are those substantially stated in the pleadings. Rome Exchange Bank *v.* Eames, 4 Abb. Ct. of App. Dec. 83, s. c., 1 Keyes, 588.

An instruction to a jury that it was not permitted to guess or presume fraud, but must find it from the evidence was held to be correct and above objection. Schroeder *v.* Walsh, 120 Ill. 403, 413, 11 N. E. Rep. 70.

"The payment by the purchaser of a fair consideration upon a sale

For this purpose circumstantial evidence is freely received,[21]

of property affords strong evidence of the good faith of the transaction, and while not conclusive on that question requires clear evidence of the existence of a fraudulent intent to overcome the presumption of honest motives, arising from that fact." Nugent *v.* Jacobs, 103 N. Y. 125, 8 N. E. Rep. 367.

One who charges a vendor with fraud must, by a preponderance of evidence in his favor, make good his charge. Steinberg *v.* Buffum, 61 Nebr. 778, 86 N. W. Rep. 491.

[21] Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. Rep. 70. The inquiry should generally be allowed to take a wide range, and much latitude should be allowed on cross-examination. Nicolay *v.* Mallery, 62 Minn. 119, 64 N. W. Rep. 108. "In every transaction where fraud is imputed, it must be conceded to be of essential importance that the jury should be put in possession of every fact and circumstance tending to elucidate the question." GOLDTHWAITE, J., Goodgame *v.* Cole, 12 Ala. 80. The evidence of it is almost always circumstantial. Nevertheless, though circumstantial, it produces conviction in the mind often of more force than direct testimony. GRIER, J., Kempner *v.* Churchill, 6 Wall. 362, 19 L. ed. 461.

While fraud must be proved, and cannot be presumed, yet direct and positive evidence is not necessary to establish it. It may be inferred from the facts and circumstances. Southern Bank *v.* Nichols, 202 Mo. 309, 100 S. W. Rep. 613.

The court held in a Nebraska case that evidence to the effect that a father had given his sons a mortgage in the form of a warranty deed, containing a false and exaggerated statement of the consideration therefor, which the sons took and withheld from record for about nine months, well knowing the involved state of their father's affairs, and that he was liable to be sued at any time, clearly established facts pointing to fraud on the part of both father and sons. Ellis *v.* Musselman, 61 Neb. 262, 85 N. W. Rep. 75.

While the courts hold that fraud will not be presumed, they cannot refuse to draw inferences flowing logically and naturally from uncontroverted facts. Thus it was held that where a guardian, after a decree had been handed down declaring him largely indebted to his wards, transferred all his property to his wife and children for a consideration of $6000 which they did not appear to be financially able to pay and of which the guardian failed to show any disposition by way of investment or otherwise, the evidence clearly pointed to fraud. Pickett *v.* Pipkin, 64 Ala. 520.

In cases where fraudulent intent is the issue, the attacking party is confronted with presumptions of honesty and fair dealing; but he may rebut these presumptions by showing facts and circumstances

and is sufficient to sustain a finding.[22] Evidence which is not altogether irrelevant, but can throw light upon the transaction, is competent, unless, taken with all other evidence offered, it could only raise a suspicion insufficient to sustain a verdict. Just how long before or after the transactions in issue evidence of collateral matter shall extend, must be determined by the trial court in the exercise of its sound discretion, in view of the circumstances of each particular case.[23]

in evidence that cannot with reason be reconciled with purity of intention. Pollak *v.* Searcy, 84 Ala. 259, 4 So. Rep. 137.

[22] Hildreth *v.* Sands, 2 Johns. Ch. 35, affi'd in 14 Johns. 493; Booth *v.* Bunce, 33 N. Y. 139.

Where a father transferred real property worth $45,000 and personal property worth $700 to his daughter in payment of her claim of less than $38,000, and it was proved that this transfer was made one month before his note for a large sum of money became due, the finding that the transfers were made to defraud, delay and hinder the father's creditors was justified. Amsterdam First Nat. Bank *v.* *v.* Miller, 163 N. Y. 165, 57 N. E. Rep. 308; rev'g 24 App. Div. 551, 49 N. Y. Supp. 981.

Evidence that a husband when insolvent had transferred virtually all his property together with all the profits derived therefrom to his wife without consideration was held sufficient to support a finding that the transfer was made to deprive his creditors of all benefits arising from the ownership of the property and in fraud of their rights. Brady *v.* Irby, 101 Ark. 573, 142 S. W. Rep. 1142, Ann. Cas. 1913, E. 1054.

[23] Gardner *v.* Meeker, 169 Ill. 40, 48 N. E. Rep. 307. When, on the trial of an action, the issue is whether the apparent purchaser of the property in controversy really purchased it with his own money, any testimony tending directly to show that he had no money of his own, or not enough to have made the purchase, is admissible; and in this connection, it may be shown whether he was engaged in any business at or before the time of the purchase, whether he was frugal or prodigal in his expenditures, and whether he was industrious or indolent in his habits; but evidence that he habitually visited saloons and houses of ill-fame is too remote, and being calculated to prejudice the jury, should be excluded. Stone *v.* Day, 69 Tex. 13, 5 Am. St. Rep. 17, 5 S. W. Rep. 642.

As a means of measuring the amount of the defendant's property at the time the plaintiff's execution was levied and as pertinent to the question of the solvency of the defendants at the time when they transferred their real estate through

Character is not in issue.[24]

A secret trust for the debtor may be proved by any kind of evidence by which fraud may be proved, notwithstanding the statute of frauds, which usually requires written evidence to establish a trust.[25]

The retention of the possession of personal property after conveyance is *prima facie* evidence of intent to defraud existing creditors of the transferor;[26] and this presumption is sufficient against both parties to the transfer; but it may

a third party to the wife of one of the defendants, the court allowed the plaintiff to offer in evidence a chattel mortgage which the defendants had executed subsequently to the transfer of their real estate but just before the maturity of the notes which were held by the plaintiff. The court said: "Fraud is usually proved by circumstances more or less remote; some of these circumstances standing alone, may be of slight importance; but much must be left to the discretion of the judge, who can better see the bearing of each particular fact upon the whole case." Sweetser *v.* Bates, 117 Mass. 466.

[24] Norris *v.* Stewart's Heirs, 105 N. C. 455, 18 Am. St. Rep. 917, 10 S. E. Rep. 912; Johnson *v.* Carnley, 10 N. Y. 570.

"It seems to be well settled in Pennsylvania that in civil cases, evidence of general character is not admissible, unless from the nature of the action character is directly drawn in issue, as in libel or slander and seduction." American F. Ins. Co. *v.* Hazen, 110 Pa. St. 530, 1 Atl. Rep. 605.

To overcome imputations of fraud committed against the creditors of the vendor of certain goods, evidence of the good character of the vendee was held inadmissible, since the law presumed that he had a good reputation until that reputation is assailed. Powers *v.* Armstrong, 62 Ark. 267, 35 S. W. Rep. 288.

[25] Bump Fraud. Conv. 542.

[26] For recent authorities, see 21 Alb. L. J. 10, 5 South. L. Rev. N. S. 617. A conveyance of land by an insolvent debtor for grossly inadequate price, and retention of possession, and failure by the grantee to record the deed, are strong badges of fraud, but not an irrebuttable presumption of it. McGee *v.* Wells, 52 S. C. 472, 30 S. E. Rep. 602.

The law is well settled, "that the unexplained retention of the possession of personal property which it is alleged has been sold to the creditors in payment of a debt by the vendor is, when the transaction is drawn into question by another creditor, a badge of fraud going to the fact of sale and the sufficiency of the consideration, casting upon the purchaser the *onus* of explaining the vendor's continued possession, so as to make

be rebutted by evidence of good faith, and any circumstances tending to show good faith are competent to go to the jury.[27] Retention of the possession of real property does not raise a presumption of fraud in a conveyance for value, but may go to the jury with other evidence. If the terms of even a recorded chattel mortgage allow the mortgagor to sell and substitute other goods, instead of applying proceeds in paying of the mortgage, it is conclusively presumed void, and good faith is irrelevant.[28] In the absence of such provisions

that fact consistent with the *bona fides* of the sale." Teague *v.* Bass, 131 Ala. 422, 31 So. Rep. 4.

The fact that a father transferred personal property worth $900 to his daughter but retained possession, was held to be evidence of fraudulent intent to delay and hinder his creditors. Amsterdam First Nat. Bank *v.* Miller, 163 N. Y. 164, 57 N. E. Rep. 308.

When a debtor secretly transferred all his property to his mother without any valuable consideration, but retained possession thereof until his death, the court held that the transfer was made with intent to defraud his creditors. Daugherty *v.* Daugherty, 104 Cal. 221, 37 Pac. Rep. 889.

[27] Proof of good faith is sufficient, without proof of excuse, for not transferring possession. Mitchell *v.* West, 55 N. Y. 107.

But a Missouri court held that even though goods were retained by the vendor beyond a reasonable time after a *bona fide* sale, the sale was not void as to existing creditors of the vendor, where the vendee had taken and retained actual, continuous possession before the creditors of the vendor instituted attachment proceedings by virtue of which they levied on the goods. McIntosh *v.* Smiley, 107 Mo. 377, 17 S. W. Rep. 979.

[28] Robinson *v.* Elliott, 22 Wall. 513; Peiser *v.* Peticolas, 8 Reporter, 408.

Under the terms of a lease, the lessor was to have a lien on all goods brought upon the premises, the lessee, however, remaining in possession. Later, an assignee of the lessee, in ignorance of the lease, sold the goods on the premises and when the lessor brought suit to declare this sale invalid, the court allowed it to stand on the ground that the lease was in fraud of any creditors who existed while the goods were in the hands of the debtor. Reynolds *v.* Ellis, 103 N. Y. 116, 8 N. E. Rep. 392, 57 Am. Rep. 701.

Where the terms of a chattel mortgage allowed the mortgagor to remain in possession of the chattels and to sell the same, retain such of the proceeds as, in his judgment, he might need to carry on his business and replenish the stock and pay the balance to the mortgagee in reduction of the latter's claim, the court held that the

in the mortgage, extrinsic evidence of intent is competent.[29] Prior fraudulent transfers by the assignor may be considered in determining whether there was any fraud in the assignment itself.[30]

The fact that an insolvent debtor, after the commencement of bankruptcy proceedings against him, transferred property, by way of preference, to a creditor, in violation of the provisions of the Bankrupt Act, is not, under the laws of NewYork, any evidence of fraud.[31]

Kinship existing between the grantor and grantee is not the badge of fraud, and does not, of itself, raise the presumption of fraud; but it is mere circumstance dependent for its value upon the other evidence, which serves to throw light on the transaction.[32]

mortgage was void. Skilton *v.* Codington, 185 N. Y. 80, 77 N. E. Rep. 790, 113 Am. St. Rep. 885.

The continuance of the grantor in possession of premises conveyed, the failure of the grantee to record the conveyance, the declarations of the grantor that the property was his—all are facts tending strongly to show that the conveyance was in fraud of creditors. Moore *v.* Tearney, 62, W. Va. 72 57 S. E. Rep. 263.

[29] Southard *v.* Pinckney, 5 Abb. New Cas. 184; Peiser *v.* Peticolas (above).

For retention of possession of real property and use of the proceeds of a loan made on the property as evidence of an intent to defraud, see St. John Woodworking Co. *v.* Smith, 82 App. Div. 348, 82 N. Y. Supp. 1025.

[30] Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. Rep. 99.

Where, just prior to an assignment for the benefit of creditors, one of the assignors paid to his wife his personal debt out of the firm assets, the assignment itself was thereby held to be fraudulent even though the assignor made the payment honestly believing that he had a right to do so, and though the wife repaid the amount which she had received to the assignee. Schwab *v.* Kaughran, 17 N. Y. Supp. 926.

[31] Talcott *v.* Harder, 119 N. Y. 536, 23 N. E. Rep. 1056.

[32] Halsey *v.* Connell, 111 Ala. 221, 20 So. Rep. 445; Graves Co. *v.* McDade, 108 Ala. 420, 422, 19 Rep. 86. The relationship of brothers does not of and in itself cast suspicion upon a transfer of property by one to the other, or create such a *prima facie* presumption against its validity as would require the court to hold it to be invalid without proof that there was fraud on the part of the grantors, participated in by the grantee. Gootlieb *v.* Thatcher, 151 U. S. 271.

5. The Consideration.

The recital of payment of a consideration, though inadequate or not even valuable, is not conclusive on defendant; [33] and plaintiff should be prepared with evidence, if he desires either to contradict the recital, or to support it against defendant's contradiction. Inadequacy may be shown by value proven by opinions of witnesses.[34]

"A transaction between relatives will be more zealously scrutinized, than if between strangers, yet relationship is not sufficient, of itself, to mark a transaction as fraudulent; and a *bona fide* creditor, though he be closely allied to his debtor, and the latter insolvent, may take property, at a fair market price, in payment of his debt, and his title will be unassailable." Moog *v.* Farley, 79 Ala. 246.

"Where the wife allows the husband to take and use her property for the support or use of the family or otherwise without an agreement on his part to pay her therefor, the relation of debtor and creditor does not exist, and a conveyance made on account of the use of such property is voluntary and invalid as against other creditors." Carr *v.* Way, 141 Iowa, 245, 119 N. W. Rep. 700.

Mere relationship without other facts and circumstances affords no presumption of law against the good faith of a sale though it may excite suspicion and may be considered with other evidence to show a fraudulent transaction. Schroeder *v.* Walsh, 120 Ill. 403, 11 N. E. Rep. 70.

The "courts scrutinize with the utmost care business transactions between husband and wife alleged to be fraudulent as against creditors, because fraud is so easily practiced and concealed under cover of the marriage relation." And in an action to set aside a conveyance made by a husband to his wife, the plaintiff by way of proving circumstances tending towards fraud was allowed to put in evidence the books of the husband to show that entries therein of the latter's indebtedness to his wife were largely fictitious. White *v.* Benjamin, 150 N. Y. 258, 44 N. E. Rep. 956.

[33] See paragraph 12. "Too commonly a fair debt is used as a little spark of honesty to animate a mass of collusion and falsehood." COWEN, J., Waterbury *v.* Sturtevant, Wend. 353.

[34] Chapter XXXVII, paragraph 5 of this vol. and notes; Dailey *v.* Grimes, 27 Md. 440, 448.

But it has been held error to admit a written statement of the valuation placed on goods in an application for the insurance of the same for the purpose of showing their value in an action to set aside the transfer of the goods as fraudulent. Blum *v.* Jones, 86 Texas, 492, 25 S. W. Rep. 694.

6. Indebtedness to Other Creditors.

The grantor's indebtedness to other creditors may be proved by parol, without producing the written obligations.[35] Judgments against him are competent in evidence for this purpose, without anything to connect the grantee with them.[36]

7. Voluntary Settlement.

A voluntary conveyance is not presumed fraudulent from the mere fact that the grantor was indebted.[37] *Prior*

[35] Snodgrass *v.* Branch Bank of Decatur, 25 Ala. 161, 173.

But the granting of a preference to one creditor is not necessarily fraudulent. Jackson *v.* Citizens' Bank, 53 Fla. 265, 44 So. Rep. 516.

[36] Hinde *v.* Longworth, 11 Wheat. 199. An expert cannot be asked whether the debtor's books showed that he was insolvent (Persse & Brooks Paper Works *v.* Willett, 1 Robt. 131, s. c., 19 Ab. Pr. 416), without producing the books or a statement drawn from them by the witness. Other rules as to proving insolvency have been already stated. Chapter XXXIV, paragraph 5.

[37] Dygert *v.* Remerschneider, 32 N. Y. 629, affi'g 39 Barb. 417. But where it is shown that the conveyance was voluntary and that the donor owed the plaintiff a large sum of money at the time such conveyance was made, the burden is upon the defendants to show that the donor retained at the time the deed was executed sufficient property to pay his debts. Ricks *v.* Stancill, 119 N. C. 99, 25 S. E. Rep. 721. When a conveyance is made without consideration, the fact of the creditors' insolvency is undoubtedly presumptive evidence of a fraudulent purpose towards creditors, but it is not a conclusive, nor the only, criterion by which to determine that question. The facts and circumstances may clearly show under Stat. 13 Eliz. c. 5, such a fraudulent intent on the part of a creditor who is not actually insolvent. Weeks *v.* Hill, 88 Me. 111, 33 Atl. Rep. 778. A conveyance from an insolvent debtor, executed after the contraction of the charges owing attacking creditors and while they were existing and unpaid, is *prima facie* fraudulent, and the burden of proving that such conveyance is founded on a valuable and adequate consideration rests upon the grantee claiming thereunder. Halsey *v.* Connell, 111 Ala. 221, 20 So. Rep. 445.

If fraudulent, the fact that the conveyance was made before the recovery of the judgment will not bar an action to set the same aside. O'Brien *v.* Stambach, 101 Iowa, 40, 69 N. W. Rep. 1133, 63 Am. St. Rep. 368.

creditors make a *prima facie* case by showing that, at the time of the transfer, he was indebted to such an extent that, having regard to his property, the effect might be to delay, hinder and defraud the creditors.[38] A settlement made when insolvent is fraudulent.[39] This presumption may be explained and rebutted; for the fraud is always a question of fact with reference to the intention of the grantor.[40] When property is conveyed by a husband to his wife, and then conveyance is assailed by the then existing creditors of the husband as being in fraud of their rights, the burden of proof is upon the wife to show the *bona fides* of the transaction.[41]

[38] Schouler's Dom. Rel. 278. Embarrassed circumstances at the time cannot be inferred from the mere fact of insolvency at a later period. Sexton *v.* Wheaton, 8 Wheat. 229. As to conveyance by husband to wife, in fraud of his creditors, chapter VI, paragraph 10 etc. of this vol.

"It is well settled that a voluntary transfer of property by one in debt is presumptively fraudulent as to creditors then existing; and if the debtor is, at the time of such gift, insolvent, or if the gift is of such amount, or made under such circumstances, as that it will hinder, delay or defraud existing creditors of such donor, then such voluntary conveyance or transfer becomes exclusively fraudulent and invalid as to existing creditors." Brady *v.* Irby, 101 Ark. 573, 142 S. W. Rep. 1124, Ann. Cas. 1913, E. 1054.

[39] Cole *v.* Tyler, 65 N. Y. 73.

"Actual insolvency is not necessary in order to render a voluntary conveyance void. If a person largely indebted makes a voluntary conveyance and shortly after becomes insolvent such conveyance will be held fraudulent." Kennard *v.* Curran, 239 Ill. 122, 87 N. E. Rep. 913.

[40] Lloyd *v.* Fulton, 91 U. S. (1 Otto) 479, 485, 1 Bish. Marr. W., § 743; Dunlap *v.* Hawkins, 59 N. Y. 342, affi'g 2 Supm. Ct. (T. & C.) 292.

[41] Stockslager *v.* Mechanics' Loan, &c. Institute, 87 Md. 232, 39 Atl. Rep. 742; Schott *v.* Machamer, 54 Neb. 514, 74 N. W. Rep. 854; Dillman *v.* Nadelhoffer, 162 Ill. 625, 45 N. E. Rep. 680. It is the general rule that fraud will not ordinarily be presumed, but must be established by the party who has alleged it. The rule does not apply in a contest between a wife and creditors of her husband, in respect to transactions involving the transfer of property from the husband to the wife. In such a contest there is a presumption against her which she must overcome by affirmative proof. She

The character of the transaction is to be determined by the circumstances surrounding the parties at the time, and the fact that months thereafter no property of the grantor could be found, upon which to levy an execution, and that

must show, by the preponderance of the evidence, the *bona fide* character of the transaction. Kirchman *v.* Kratky, 51 Neb. 191, 70 N. W. Rep. 916. The recital of a valuable consideration in a deed from an insolvent husband to his wife does not rebut the presumption of fraud which the law raises in the case of such a conveyance. Redmond *v.* Chandley, 119 N. C. 575, 26 S. E. Rep. 255. The declarations of the husband to the wife at the time of the conveyance to her of certain property, as to his purpose in making it, are privileged, and it is error to compel the wife to testify thereto; nor can the creditors or heirs of the husband waive the privilege. Emmons *v.* Barton, 109 Cal. 662, 42 Pac. Rep. 303. Where the law of the state provides that a wife shall not be examined as a witness for or against her husband without his consent, nor as to any communication made to her by him during the marriage relation, the wife of a bankrupt, under examination as a witness in the bankruptcy proceedings, cannot be required to disclose any communications made to her by her husband respecting his property or his income. Re Jefferson, 96 Fed. Rep. 826.

Where a husband conveyed his property to his wife, and a creditor of the husband sought to set this transfer aside in his favor, the court held that inasmuch as the controversy was between the creditor and the wife, there was a presumption against her which she must overcome by proof. Noble *v.* Gilliam, 136 Ala. 618, 33 So. Rep. 861.

A husband conveyed his land through a third person to his wife and in the deeds of conveyance the consideration recited was one dollar. It was held that the burden of proof was on the wife to establish a consideration for the transfer to her and even then the conveyance is good as security to her only to the extent of the amount her husband received from her together with the interest thereon. Adoue *v.* Spencer, 62 N. J. Eq. 782, 49 Atl. Rep. 10, 90 Am. St. Rep. 484, 56 L. R. A. 817.

Even when a wife is in possession of the property and asserts ownership thereof at the time her husband's creditors assert their rights thereto, the burden of proving that a transfer to her was not to defraud her husband's creditors rests upon the wife. Stevens *v.* Carson, 30 Neb. 544, 36 N. W. Rep. 655, 9 L. R. A. 523.

In a creditor's suit to subject land conveyed by the debtor to his wife to the payment of judgments against him, the presumption is that such conveyance was fraudulent and this presumption must be met by affirmative proof

he was then insolvent is insufficient to establish the fraud.[42]

Evidence tending to show that the debtor had other property not levied on at the date of the deed alleged to have been executed to defraud creditors, is competent to show the *bona fides* of the transaction.[43] Where there are no prior creditors, a *subsequent* creditor (especially if impeaching a settement on the children) must show that it was intended to defraud those who might become creditors.[44] Evidence that it was made just before entering a hazardous enterprise, imposes upon the grantor the burden of proving that he was solvent and in a position to make it.[45]

8. Intention of the Debtor.

Where the facts in evidence do not raise a legal pre-

to the contrary. Bennett *v.* Boshold, 123 Ill. App. 311.

[42] Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. Rep. 105.

[43] McGee *v.* Wells, 52 S. C. 472, 30 S. E. Rep. 602.

Where a grantee of property, the transfer of which was attacked as fraudulent, insisted that the grantor had other property out of which the grantor's creditors might have satisfied their claims, he had the burden of proving that contention. Ames *v.* Dorrah, 76 Miss. 187, 23 So. Rep. 768, 71 Am. St. Rep. 522.

[44] Sexton *v.* Wheaton (above); Smith *v.* Vodges, 92 U. S. (2 Otto) 183; Zimmerman *v.* Schoenfeldt, 3 Hun, 692, s. c., 6 Supm. Ct. (T. & C.) 142. *Contra*, Redfield *v.* Buck, 35 Conn. 328.

And where a party at a time when he was in affluent circumstances, settled upon his children certain interests in notes which he held, and thereafter received the proceeds therefrom, and later still by a series of transactions, at a time when he was insolvent, conveyed to one of his sons certain land to take the place of his former gift, the holders of his notes, which he had executed a considerable time after the original gift to his children, were held to have the *onus* of proving a fraudulent intent in making the conveyance to the son. Beloit Second Nat. Bank *v.* Merril, 181 Wis. 142, 50 N. W. Rep. 503, 29 Am. St. Rep. 877.

Where a plaintiff began an action against the defendant for assault, and thereafter but before the recovery of judgment, the defendant transferred all his property to his wife, the plaintiff was held to be a subsequent creditor who must prove actual fraud. Ford *v.* Johnston, 7 Hun, 563.

[45] Mackay *v.* Douglass, L. R. 14

sumption of fraud, the debtor may be asked, as a witness, whether he intended to defraud,[46] and he may state the particular reasons which induced the act, and that he communicated those reasons to his creditors before the act.[47] But while he may be examined as to his own intentions and motives it is not competent for him to testify as to the motives or intent of the grantee.[48] His testimony, that he did not intend to defraud, is not conclusive.[49]

Subject to the qualifications below stated, in reference to the admissibility of the admissions and declarations of an assignor, other fraudulent transfers made by the same debtor, at about the same time, may be proved, for the purpose of showing his intent in the transfer in ques-

Eq. C. 106, s. c., 3 Moak's Eng. 659.

[46] Seymour *v.* Wilson, 14 N. Y. 567, s. c., 15 How. Pr. 355; Pope *v.* Hart, 35 Barb. 630, s. c., 23 How. Pr. 215; Gardom *v.* Woodward, 44 Kans. 758, 21 Am. St. Rep. 310, 25 Pac. Rep. 199; Pittsburgh, &c. Ry. Co. *v.* Noftsger, 148 Ind. 101, 47 N. E. Rep. 332. Where the evidence of continued possession creating the presumption of fraud was elicited from the defendants (the alleged fraudulent vendor and vendee) when on the stand as witnesses for the plaintiff, the fact that such witnesses also testified that the sale was made in good faith and without an intent to defraud and for a valuable consideration, does not of itself rebut the statutory presumption and throw upon the plaintiff the burden of proving fraud affirmatively. New York Ice Co. *v.* Cousins, 23 N. Y. App. Div. 560.

"Where the character of the transaction depends on the intent of the party, he may testify as to what his intent was." See cases cited. Durfee *v.* Bump, 3 N. Y. Supp. 505.

In Love *v.* Tomlinson, not only was the debtor allowed to state what his intention was when he authorized his agent to sell his horses and cattle, but the agent himself was permitted to say whether or not he had made the sale to the plaintiff vendee with the intention of hindering, delaying or defrauding his principal's creditors. Love *v.* Tomlinson, 1 Colo. App. 516, 29 Pac. Rep. 666.

[47] Persse & Brooks Paper Works *v.* Willett, 1 Robt. 131, s. c., 19 Abb. Pr. 416. The belief of the debtor that his debt was paid at the time of his making conveyance is admissible. Stacy *v.* Deshaw, 7 Hun, 449.

[48] Manufacturers, &c. Bank *v.* Koch, 105 N. Y. 630, 12 N. E. Rep. 9.

[49] Newman *v.* Cordell, 43 Barb. 448; Bruce *v.* Kelly, 39 Super.

tion,[50] though there be no evidence that the grantee knew

Ct. (7 J. & S.) 27; Kimball *v.* Thompson, 58 Mass. (4 Cush.) 441.

[50] It is competent for a creditor to prove the fact of contemporaneous fraudulent transactions with a view of raising an inference of fact that other transactions made at or about the same time, and which are the subject of litigation, were made for a similar purpose and intent. Spaulding *v.* Keyes, 125 N. Y. 113, 116, 26 N. E. Rep. 15; McCasker *v.* Enright, 64 Vt. 488, 33 Am. St. Rep. 938, 24 Atl. Rep. 249; Davis *v.* Vories, 141 Mo. 234, 42 S. W. Rep. 707. Such evidence may not be excluded because it does not bear upon the intent of the grantee. Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. Rep. 928. Where fraud in the sale or purchase of property is in issue, evidence that other frauds of like character, committed by the same parties, at or near the same time, is admissible. Its admissibility is placed upon the ground that, where transactions of similar character are executed by the same parties, and closely connected in point of time, the inference is reasonable that they proceed from the same motive. Piedmont Bank *v.* Hatcher, 94 Va. 229, 231, 26 S. E. Rep. 505; Hood *v.* Chicago, &c. Ry. Co., 95 Iowa, 331, 339, 340, 64 N. W. Rep. 261. In an action to rescind a contract on the ground of fraudulent misrepresentations, it is not necessary to allege conspiracy in order to introduce evidence of similar transactions at or about the same time, each transaction being charged to be one of a series of fraudulent purchases made with an intent not to pay, and through false representations. Cox Shoe Co. *v.* Adams, 105 Iowa, 402, 75 N. W. Rep. 316. But another act of fraud by a person is admissible to prove the particular act of fraud charged against him only when it is shown that the two were so connected as to make it appear that he had a common purpose in both. White *v.* Beal, &c. Grocer Co., 65 Ark. 278, 45 S. W. Rep. 1060; McKay *v.* Russell, 3 Wash. 378, 27 Am. St. Rep. 44. Hence, in a suit by a vendor to recover personal property alleged to have been fraudulently purchased on credit with intent not to pay for it, it is not admissible to prove that other vendors have sued and recovered personal property so purchased. White *v.* Beal, &c. Grocer Co., 65 Ark. 278, 45 S. W. Rep. 1060. Deeds given by the insolvent or recorded through the same year, some before and some after the pretended sale of chattels to the plaintiff, are admissible in evidence, as bearing upon a contemplated insolvency. Stuart *v.* Redman, 89 Me. 435, 36 Atl. Rep. 905.

In proving the fraudulent character of a sale made to the plaintiff by his brother, it was held competent for the defendant, a creditor of the brother, to offer evidence that shortly after the sale in ques-

of them.[51] Such other frauds are only evidence for the jury, and do not raise a presumption of law.[52]

In assailing an assignment for creditors it is only necessary to establish the fraudulent intent of the assignor, and if this be shown the assignment is void, and the assignee, however innocent he may be of the fraud, will not be permitted to act under it, and the creditors may then pursue their remedies as if the assignment had not been made.[53]

9. — of His Grantee.

To impeach a conveyance for valuable consideration,[54]

tion the brother transferred certain real estate to the plaintiff and his house and lot to his wife, thus divesting himself of all his property. Beuerlien *v.* O'Leary, 149 N. Y. 33, 43 N. E. Rep. 417.

[51] Foster *v.* Hall, 12 Pick. 89, 99; Cathcart *v.* Robinson, 5 Pet. 264; Van Kirk *v.* Wilds, 11 Barb. 520; Fuller *v.* Acker, 1 Hill, 473; Taylor *v.* Robinson, 2 Allen (Mass.), 562; and compare Reed *v.* Stryker, 4 Abb. Ct. App. Dec. 26. See Bump Fraud. Con. 544. According to some authorities, it should appear that all were a part of the same general plan. Angrave *v.* Stone, 45 Barb. 35, affi'g 25 How. Pr. 167; Lynde *v.* McGregor, 13 Allen, 172. See the same distinction in chapter XXXIV, paragraph 8 of this vol. Under the free rules of evidence now applied, it is consonant with general principles to allow evidence of any fraudulent transaction which indicates fraudulent intent on the part of the grantor in making the transfer in question; for proving fraud in one party is one step toward proving it in both. But it is only one step; and where it is necessary to prove fraud in the grantee, other fraudulent transfers in no wise connected do not avail as evidence against him, and there must be further proof not only of intent on his part, but proof competent against him of intent on the part of his grantor. In other words, plaintiff need not prove a common or communicated intent; and even where he must prove concurring intentions, he may prove each by independent evidence; and evidence which proves the intent of one party is not inadmissible merely because it is no evidence of the intention of the other. A similar question as to the *res gestæ* of a payment remains somewhat unsettled. Chapter XII, paragraph 15.

[52] Livermore *v.* Northrup, 44 N. Y. 107; Spaulding *v.* Keyes, 125 N. Y. 113, 26 N. E. Rep. 15.

[53] Loos *v.* Wilkinson, 110 N. Y. 195, 18 N. E. Rep. 99.

[54] Waterbury *v.* Sturtevant, 18 Wend. 353; Jackson *v.* Citizens'

or a mortgage for value,[55] or an assignment by way of lawful security,[56] or an ante-nuptial settlement,[57] it is necessary to show fraudulent intent on the part of the grantee,[58] or that he took with notice of the grantor's intent.[59] To establish notice to a grantee, even for value, it is enough to show such circumstances as ought reasonably to have excited his suspicions and put him on inquiry; but proof of

Bank, etc., Co., 53 Fla. 265, 44 So. Rep. 516.

[55] Carpenter *v.* Muren, 42 Barb. 300.

[56] Griffin *v.* Cranston, 1 Bosw. 281.

A judgment creditor cannot subject to the lien of his judgment real estate now held by a *bona fide* purchaser who bought before the judgment was entered, although the judgment was subsequently entered *nunc pro tunc* as of a date prior to the purchase. Coe *v.* Erb, 59 Oh. St. 259, 52 N. E. Rep. 640, 69 Am. St. Rep. 764.

[57] Magniac *v.* Thompson, 7 Pet. 348, affi'g 1 Baldw. 344. But not other conveyances in consideration of love and affection only, even if impeached by subsequent creditors only. Savage *v.* Murphy, 34 N. Y. 508. *Contra*, Holmes *v.* Clark, 48 Barb. 237.

Where a party proved that she had purchased property from the vendor for valuable consideration and that she had no knowledge of any creditors of the vendor other than herself, she could not be charged with taking the property in question with the intent to delay, hinder and defraud other creditors of the vendor. Morse *v.* Vely, 123 Mich. 532, 82 N. W. Rep. 225. See also Fisher *v.* Stout, 74 App. Div. 97, 77 N. Y. Supp. 945.

[58] Jackson *v.* Mather, 7 Cow. 301. See Fulton Southern Bank *v.* Nichols, 202 Mo. 309, 100 S. W. Rep. 613.

[59] So a creditor of a testator, who impeaches the validity of the mortgage or sale by an executor for purposes of misapplication, has the burden of proving that the mortgagee of the purchaser had notice of the true state of the facts. Corser *v.* Cartwright, L. R. 7 Ho. of L. 731, s. c., 14 Moak's Eng. 115. Compare chapter XLVIII, paragraph 38 of this vol.

"A purchaser who aids or assists a debtor to defraud his creditors, or who has actual knowledge of the fraudulent intent with which the sale to him is made, will not be permitted to assert a claim against the debtor's estate until the creditors have been satisfied." Walters *v.* Akers, 101 S. W. Rep. 1179, 31 Ky. L. 259.

Where a city bought land from a judgment debtor and its officers engaged in the transaction had actual or constructive notice that such sale by the judgment debtor was to hinder and delay its creditors, the land in the hands of the

such circumstances is not conclusive; the grantee may show that he exercised due dillgence, and failed to discover the prior right.[60] Evidence that the grantee had reasonable cause to believe the grantor insolvent is competent,[61] but not conclusive.[62] The grantee, like the grantor, may be examined as to his own intent.[63]

city will be subjected to the payment of the debts of the judgment debtor. Westcott *v.* Sioux City, 141 Iowa, 453, 119 N. W. Rep. 749.

[60] Williamson *v.* Brown, 15 N. Y. 354, 362; Herlich *v.* Brennan, 11 Hun, 194; and see Reed *v.* Cannon, 50 N. Y. 345.

Where a brother confessed judgment in favor of his sister for an amount far in excess of his indebtedness to her, still the court held that this judgment was not, in the absence of other evidence tending toward fraud, a transfer to cheat other creditors of the brother, inasmuch as the sister, inexperienced in business, relied entirely on her brother's statements as to the amount he owed her. Merchants' Bld'g, etc., Assoc. *v.* Barber (N. J. Ch.) 30 Atl. Rep. (N. J.) 865.

[61] Lee *v.* Kilburn, 3 Gray, 594, 598. See chapter XXXIV, paragraph 6 of this vol. Evidence of reputation is competent as tending to prove notice, or want of notice, of insolvency, or cause, or want of cause, to believe the reputed party insolvent. Hahn *v.* Renney, 62 Minn. 116, 63 N. W. Rep. 843.

In an action attacking a deed as fraudulent, a letter which the assignee in the deed wrote to the assignor suggesting that he make false representations to obtain credit and offering to assist him in obtaining this fictitious credit was held admissible to show the assignee's knowledge of the assignor's insolvency. Clark *v.* Finn, 12 Mo. App. 583.

"If a creditor knows of his debtor's insolvency and takes more than reasonably enough to pay or secure his debt and pays cash for the excess, the transaction is fraudulent in law and the purchaser is a participant in the fraud." Plattsburg First Nat. Bank *v.* Fry, 216 Mo. 24, 115 S. W. Rep. 439.

[62] Waterbury *v.* Sturtevant, 18 Wend. 353. Whether notice to an agent or attorney is competent and sufficient, see Weiss *v.* Brennan, 41 Super. Ct. (J. & S.) 177; Hoover *v.* Greenbaum, 62 Barb. 188, affi'd 61 N. Y. 305, affi'd *sub nom* Hoover *v.* Wise, 91 U. S. (1 Otto. 308; May *v.* Le Claire, 11 Wall. 217; Foster *v.* Hall, 12 Pick. 89, 98; Lynde *v.* McGregor, 13 Allen, 172. As to competency of attorney as witness, see N. Y. Code Civ. Pro., § 835.

[63] Bedell *v.* Chase, 34 N. Y. 386.

The vendor and the vendee may both testify that the sale was

10. Admission and Declarations.

In applying the general rules elsewhere stated,—which exclude admissions and declarations made by an owner, when offered to affect his successor's title to real,[64] but not to personal property or things in action,[65]—it should be observed that, in a creditor's suit, both grantor and grantee being parties (as is usually the case), the declarations of the grantor are usually admissible for the purpose of charging him,[66] whether they relate to realty or personalty; for what a party has said about his own case is always admissible against him. But it is not enough that there is such evidence of fraud on the part of the grantor, made competent against him. There must also be evidence of it, competent against the grantee.[67]

The doctrine of the New York courts is, that acts, admissions and declarations of the grantor, after he has parted

made without any intent to delay, hinder or cheat the creditors of the vendor. Wilson *v.* Clark, 1 Ind. App. 182, 27 N. E. Rep. 310.

[64] Chapter XLVIII, paragraph 30, of this vol.; Jackson *v.* Myers, 11 Wend. 533; Norton *v.* Pettibone, 7 Conn. 319.

[65] Chapter I, paragraphs 27 *et seq.*

[66] Gamble *v.* Johnson, 9 Mo. 597, 615; Venable *v.* Bank of the U. S., 2 Pet. 107, 119.

Statements explaining why a sale took place, made while the goods were being transferred from the vendor's premises to the neighboring ranch, but before the transfer was completed were admissible to throw light on the character of the sale and to assist the jury in determining whether or not the same was *bona fide*. Eppinger *v.* Scott, 112 Cal. 369, 42 Pac. Rep. 301, 44 Pac. Rep. 723, 53 Am. St. Rep. 220.

[67] Even in case of an assignment for benefit of creditors, fraud on the part of the grantor must be established by evidence competent against the assignee. Evidence of the assignee's declarations such as are competent against him alone, or even against him and an assignee who has been removed, is not enough to sustain the action against the assignee. Cuyler *v.* McCartney, 40 N. Y. 221, rev'g 33 Barb. 165. And even where it is only necessary to prove fraud in the grantor, and his subsequent admissions are satisfactory evidence against himself, there must be evidence competent against the grantee; otherwise a grantor, having made a fair conveyance, could annul it by subsequent transactions or even admissions.

with title,[68] are not competent against the grantee, unless there be independent evidence of fraud to connect the two, and bring them within the rule as to confederates.[69] But for

[68] See Conkling *v.* Weatherwax, 181 N. Y. 258, 73 N. E. Rep. 1028, 2 Ann. Cas. 740. This rule, while it admits declarations made after the executory contract to sell, excludes those made after the inception of the transfer. Vrooman *v.* King, 36 N. Y. 477, 483, and cases cited. Compare, for the distinction in various cases on incomplete execution or delivery, Wyckoff *v.* Carr, 8 Mich. 44; Bunker *v.* Green, 48 Ill. 243; McLanathan *v.* Patten, 39 Me. 142; McClellan *v.* Cornwall, 2 Coldw. (Tenn.) 298, 305; Goodgame *v.* Cole, 12 Ala. 77, 82.

[69] Where the title of a vendee of personal property who purchased in good faith is attacked as fraudulent by creditors of the vendor, the declarations of a vendor, when not a party, made previous to the sale to a stranger, in the absence of the vendee, are not competent, save where a conspiracy to defraud between the vendor and vendee has been shown, or where the vendor after the sale continues in possession, exercising acts of ownership over the property, thus raising the presumption that the sale was fraudulent. Flannery *v.* Van Tassel, 127 N. Y. 631, 27 N. E. Rep. 393; Baldwin *v.* Short, 125 N. Y. 553, 26 N. E. Rep. 928; Spaulding *v.* Keyes, 125 N. Y. 113, 116, 26 N. E. Rep. 15; Bush *v.* Roberts, 111 N. Y. 278, 18 N. E. Rep. 732; Beste *v.* Burger, 110 N. Y. 644, 17 N. E. Rep. 734; Coyne *v.* Weaver, 84 N. Y. 386; Lent *v.* Shear, 160 N. Y. 452. The rule is the same, whether the assignee be one for value, or merely a trustee for creditors, and whether whether such declarations be antecedent or subsequent to the assignment. Truax *v.* Slater, 86 N. Y. 630. See also Thomas *v.* McDonald, 102 Iowa, 564, 71 N. W. Rep. 572; Vyn *v.* Keppel, 108 Mich. 244, 65 N. W. Rep. 966. But see Smith *v.* Boyer, 29 Neb. 76, 26 Am. St. Rep. 373, 45 N. W. Rep. 265. On the trial of the question as to the validity of a mortgage claimed to be fraudulent as to the creditors of the mortgagor, fraudulent acts and declarations of the mortgagor made contemporaneously with or prior to the execution of the mortgage may be shown. The fraudulent purpose of the mortgage being shown by competent evidence, knowledge of or participation in his fraud by the mortgagee may be proved by any competent evidence, and it is not necessary to show that the mortgagee had notice of each particular fraudulent act or attempt of the mortgagor. Sherman County Bank *v.* McDonald, 57 Kan. 358, 46 Pac. Rep. 703. In a suit to set aside as fraudulent a series of conveyances, whereby the husband's property was vested in his wife, it is competent to prove the statements, made while he held the title, by any of the parties through whom it passed, tending to show that the transaction was

this purpose independant evidence that the grantor, after selling, continued in a possession which is presumptively fraudulent, is enough to let in declarations made during its continuance.[70] The declarations cannot aid the proof of combination. If there be not independent evidence of combination, the assignor should be offered as a witness, instead of resorting to proof of his declarations.[71]

If there is independent evidence connecting the grantor and grantee in an attempt to defraud, the acts, admissions and declarations of either are admissible against the other, within the limits already stated;[72] and it need not be shown that the latter had any knowledge of them.[73]

a fraudulent scheme. Harton *v.* Lyons, 97 Tenn. 180, 36 S. W. Rep. 851. Where a conveyance from an insolvent debtor to his creditor is attacked for fraud, the declarations of the grantor while in possession of the land, after the conveyance, explanatory of his possession, and to the effect that he held for another, are admissible in evidence. Mobile Savings Bank *v.* McDonnell, 89 Ala. 434, 18 Am. St. Rep. 137, 8 So. Rep. 137.

A testator devised a farm to his son and directed him to pay his daughter a legacy. The son on coming into possession of the land mortgaged it and some years later died In an action brought by the daughter, after the death of the son and some thirty years after the testator had died, to enforce her legacy as a lien on the mortgaged premises, the declarations of the deceased mortgagor that he had not paid the legacy in question were held to be incompetent to "affect or defeat the lien of the mortgage, when there was no identity of interest between the mortgagor and the mortgagee." Conkling *v.* Weatherwax, 181 N. Y. 258, 73 N. E. Rep. 1028, 2 Ann. Cas. 740.

[70] Lee *v.* Huntoon, Hoffm. 447, 453; Adams *v.* Davidson, 10 N. Y. 309; Newlin *v.* Lyon, 49 Id. 661. A possession resumed, after delivery once made and continued, is not enough. Tilson *v.* Terwilliger, 56 N. Y. 273.

[71] Cuyler *v.* McCartney, 40 N. Y. 221, 226.

[72] Chapter VII, paragraph 9 of this vol.; Cuyler *v.* McCartney, 40 N. Y. 221; Newlin *v.* Lyon, 49 N. Y. 661.

The defendant confessed judgment in favor of his creditor, a brother, who withheld the same

[73] See Walton *v.* Silverton First Nat. Bank, 13 Colo. 265, 22 Pac. Rep. 440, 16 Am. St. Rep. 200, 5 L. R. A. 765; Nudd *v.* Burrows, 91 U. S. (1 Otto) 421, 438. Declarations made before the combination are not made competent. Legg *v.* Olney, 1 Den. 202.

But the acts, admissions and declarations of grantor or grantee, though made while holding title and possession, are not evidence in his favor, or in favor of those claiming under him, to disprove fraud, unless a part of the *res gestæ*,[74] or where the making of the declarations, and not its truth, is the relevant fact.[75]

Although the books of the debtor are not competent as against a creditor seeking to recover a judgment for his debt, they may be introduced by a judgment creditor to support an attack in equity upon the transfer of property by the judgment debtor to a third person, claiming a valid debt as the consideration for the transfer. Entries made in the ordinary course of business, while the debt in dispute was in process of contraction, are competent as to another creditor, for the purpose of showing that there was no such debt, or that it was materially less than the amount claimed. While such evidence is not conclusive, it has a bearing upon the question of the intent and good faith of the judgment debtor, as it shows how he acted or failed to act with reference to a principal fact.[76]

from record with the confessed purpose, although he knew of the defendant's insolvency, of assisting the latter in securing credit. It was agreed that the defendant would notify his brother's attorney, in case other creditors were about to proceed against his property. In an action on a note of the defendant, the cashier of the plaintiff bank stated that at the time the defendant had asked for a renewal of his note, he had said that his only creditor was his brother whose claim was unsecured and would not be pressed. The cashier's testimony was admitted on the grounds that the transactions between the brothers was a clear case of confederation so that the declarations of either were admissible against the other. Walton *v.* Silverton First Nat. Bank, 13 Colo. 265, 22 Pac. Rep. 440, 16 Am. St. Rep. 200, 5 L. R. A. 765.

[74] Ward *v.* Saunders, 6 Ired. (N. C.) L. 382, 387; Badger *v.* Story, 16 N. H. 168; Hale *v.* Stone, 14 Ala. 803, 806; Tevis *v.* Hicks, 41 Cal. 123.

[75] Place *v.* Gould, 123 Mass. 347, and cases cited.

[76] White *v.* Benjamin, 150 N. Y. 258, 266–267, 44 N. E. Rep. 956. Copies of statements made to a commercial agency by a merchant as to his financial standing, taken in writing at the time, and shown to have been afterwards approved by him, are admissible in evidence

11. Defense.

Defendant may show any ground of equitable impeachment of the judgment.[77] But mere irregularity in it or in the execution,[78] is no defense, nor is the fact that the execution was returned in less than sixty days, unless shown to have been done in bad faith.[79] Neither a second execution, levied after commencement of action, nor a second judg-

in favor of creditors who have relied upon such statements, and claim them to be fraudulent and false. Mooney *v.* Davis, 75 Mich. 188, 13 Am. St. Rep. 425, 42 N. W. Rep. 802.

But it has been held that when a party defended a transfer made to himself claiming that he took the property to apply on a debt due him, the books of the debtor were admissible in evidence as part of the *res gestæ* on the question of indebtedness, though any suspicious features connected with them were held to be inadmissible as evidence against the party taking the property unless there was some proof offered connecting him with it. Pollak *v.* Searcy, 84 Ala. 259, 4 So. Rep. 137.

[77] Smith *v.* Crocheron, 2 Edw. Ch. 501, and see Mandeville *v.* Reynolds, 68 N. Y. 528, 5 Hun, 338; Teed *v.* Valentine, 65 N. Y. 471. *Contra*, Mattingly *v.* Nye, 8 Wall. 370.

The grantee of premises conveyed in fraud of creditors may plead any defense which the debtor had, and where a bill to subject land now in the grantee's name to the payment of the grantor's debts shows on its face that the statute has run against the claim, the bill is demurrable. Harper *v.* Raisin Fertilizer Co., 158 Ala. 329, 48 So. Rep. 589, 132 Am. St. Rep. 32.

The statute of limitations does not begin to run against the right of a judgment creditor to subject to his judgment lands fraudulently purchased by the judgment debtor in the name of his children until the judgment creditor discovers the fraud. Foot *v.* Harrison, 137 Wis. 588, 119 N. W. Rep. 291.

[78] "A return by a sheriff which recites that a personal demand has been made, and no property turned out or found, is the highest evidence that the law affords of the fact that the legal remedies of the plaintiff have been exhausted, and is a sufficient return to confer jurisdiction in equity to maintain a creditor's bill." Illinois Malleable Iron Co. *v.* Graham, 55 Ill. App. 266.

[79] See also How *v.* Babcock, 72 Ill. App. 68.

Nor will the fact that the sheriff made a false return of "no property found" be an available defense where it cannot be proved that the creditor had procured the return or had anything to do with it in any way. Clements *v.* Waters, 90 Ky. 96, 13 S. W. Rep. 431, 11 Ky. L. Rep. 880.

ment, is necessarily a bar; it depends on whether the circumstances will sustain an inference of satisfaction.[80]

The grantee may prove the circumstances and the advice on which he took the transfer, for the purpose of showing good faith.[81]

12. — Evidence of Consideration Paid.

The recital, in a conveyance sought to be impeached, of payment of a valuable consideration, is presumptive evidence of its payment.[82] Its inadequacy is material only on the question of fraudulent intent.[83] In case of a mortgage,

[80] When one execution issued on a judgment was returned "no property found," and subsequently a second execution was issued under which property of a value far less than the amount of the judgment was subjected to levy, the return of the second execution was no bar to the right to file a bill in equity founded on the return of the first execution. Helm *v.* Hardin, 2 B. Mon. (Ky.) 231.

And where a judgment creditor had obtained two judgments against the debtor, but execution on only one had been returned unsatisfied at the time the judgment creditor began an action to set aside a conveyance as fraudulent, the court refused to dismiss the complaint, holding that the return on the one judgment was a sufficient basis for the action. St. John Woodworking Co. *v.* Smith, 82 App. Div. 348, 82 N. Y. Supp. 1025.

[81] Norton *v.* Mallory, 63 N. Y. 434, affi'g 1 Hun, 499, s. c., 3 Supm. Ct. (T. & C.) 640; Goodgame *v.* Cole, 12 Ala. 77, 80; Fisher *v.* True, 38 Me. 535. Evidence that an alleged fraudulent vender of chattels was in ill health, and required a change of climate, is admissible to show the good faith of the transaction. Vyn *v.* Keppel, 108 Mich. 244, 65 N. W. Rep. 966.

[82] Thallhimer *v.* Brinckerhoff, 6 Cow. 90; Jackson *v.* McChesney, 7 Id. 360; Carpenter *v.* Freeland, Hill & D. Supp. 37; Foster *v.* Hall, 12 Pick. 89, 92. *Contra*, Kimball *v.* Fenner, 12 N. H. 248.

The debtor transferred certain real estate, through a third person, to his wife. The consideration recited in both deeds was $900. The court held that the instruments themselves were "*prima facie* evidence that such was the true consideration, and that it had been paid. But the plaintiff had the right to rebut this presumption, and to show" that the sums recited in the deeds were not the real considerations and that there had been no such payment. Amsden *v.* Manchester, 40 Barb. (N. Y.) 158.

[83] Jackson *v.* Peek, 4 Wend. 300;

the bond [84] or note [85] to which it is collateral, if produced and proved,[86] and shown to be connected with the mortgage,[87] is presumptive evidence of a just debt. After plaintiff has given evidence of fraud, defendant should give extrinsic evidence of consideration, if he relies on that. A conveyance purporting to have been voluntary, cannot be contradicted by evidence that it was for value.[88] But the indebtedness to

Twyne's Case, 1 Smith's L. Cas. 33, 47. It is not sufficient to condemn a conveyance of land as a fraud upon creditors of the grantor that it was not founded upon a valuable consideration; other facts must be proved showing that the conveyance was made with a fraudulent intent. Kain *v.* Larkin, 131 N. Y. 300, 30 N. E. Rep. 105.

The recitals in a deed by which land was transferred from the defendant to his mother-in-law, to the effect that the grantee had paid the grantor one dollar and other valuable consideration was held to be no evidence of consideration as against a creditor attacking the conveyance as voluntary and fraudulent. The creditor had the burden of proving fraud, but the *onus* of showing that the deed was executed for a valuable consideration rested on the grantee. Rogers *v.* Verlander, 30 W. Va. 619, 5 S. E. Rep. 847.

[84] Dunham *v.* Gates, 3 Barb. Ch. 196.

[85] Dunham *v.* Whitehead, 3 Abb. Pr. 207.

It appeared that a guardian who ran a grocery business in her own name, used her ward's money in the conduct thereof and to secure the payment of the debt thus contracted, gave her note to the trustee of her ward and secured it by executing a chattel mortgage on her goods and fixtures. Her creditors levied on the mortgaged property and the plaintiff, trustee, brought action to recover damages for the levy. To defeat the claim of a fraudulent execution of the note and chattel mortgage, the court allowed the plaintiff to offer the note and mortgage in evidence holding that a negotiable promissory note was *prima facie* evidence of consideration and that upon proper identification of the note and mortgage they were admissible. Plummer *v.* Green, 49 Neb. 316, 68 N. W. Rep. 500.

[86] As to mode of proof, see chapter XXI, paragraphs 4 *et seq.* and chapter XXVII, paragraphs 1 *et seq.* of this vol.

[87] Baskins *v.* Shannon, 3 N. Y. 310.

[88] Potter *v.* Gracie, 58 Ala. 303, s. c., 29 Am. Rep. 748; Bump. Fraud. Conv. 555, 558.

Nor can a conveyance for which the consideration purported to have been $300, when attacked as fraudulent because of inadequacy of consideration be supported by claiming that it was a voluntary

the grantee may be shown as evidence rebutting extrinsic evidence of fraud in fact.[89] If plaintiff has disproved the pecuniary consideration recited, defendant may prove the actual pecuniary consideration in support of the instrument.[90] Payment since commencement of the action is inadmissible.[91] The payment may be proved by a witness, without accounting for receipts shown to have been taken;[92] or by the previous transactions between the parties to the instrument,[93] and the state of their accounts.[94] The existence of an indebtedness having been shown, the debtor may testify directly that he was indebted to the grantee.[95]

conveyance. Diggs *v.* McCullough, 69 Md. 592, 16 Atl. Rep. 453.

[89] Hinde *v.* Longworth, 11 Wheat. 199.

Where, however, the defendant showed that when he made a transfer of property to his wife he was indebted to her in the sum of $2,000, this did not avail either the husband or the wife as a defense to the charge of having made the transfer without consideration, for the reason that a transfer made to the wife without her consent could not be made in satisfaction of the debt owing from the husband. Ames *v.* Dorroh, 76 Miss. 187, 23 So. Rep. 786, 71 Am. St. Rep. 522.

[90] McKinster *v.* Babcock, 26 N. Y. 378, rev'g 37 Barb. 265.

[91] Angrave *v.* Stone, 45 Barb. 35, affi'g 25 How. Pr. 167.

[92] Johnson *v.* Cunningham, 1 Ala. 249, 257; Planters' Bank *v.* Borland, 5 Id. 531, 543.

[93] Jaycox *v.* Caldwell, 51 N. Y. 395, affi'g 37 How. Pr. 240. So also, in rebuttal, Treat *v.* Barber, 7 Conn. 274.

[94] De Forest *v.* Bacon, 2 Conn. 633. Compare Isham *v.* Schafer, 60 Barb. 317.

[95] Jaycox *v.* Caldwell (above). While the payment by the purchaser of a fair consideration upon a sale of property is not conclusive as against the creditors of the vendor, upon the question of good faith, it affords strong evidence thereof, and requires clear proof of a fraudulent intent to overcome the presumption of honest motives arising therefrom. Nugent *v.* Jacobs, 103 N. Y. 125, 8 N. E. Rep. 367.

CHAPTER LII

ACTIONS FOR DIVORCE

1. Marriage.
2. Fraud.
3. Impotence.
4. Adultery.
5. — circumstantial evidence.
6. — cogency of proof.
7. — opinions of witnesses.
8. — limits of the issue of adultery in respect to time and place.
9. — and as to paramour.
10. — delay.
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12. Cruelty.
13. Witnesses.
14. Confessions and admissions.
15. Condonation.

1. Marriage.

There must be evidence of actual marriage. Cohabitation and repute is relevant, but not alone enough.[96]

2. Fraud.

The fraud proved must be that alleged.[97] Express representation of chastity need not be proved to substantiate

[96] 2 Bish. Marr. & Div., § 266, &c.; Chapter V, paragraphs 14, &c. of this vol. The mode of proving the material facts essential to the jurisdiction has already been stated. See chap. V.

Cohabitation, a mutual recognition of each other as husband and wife, and reputation, are evidence of marriage and entitled to more or less weight according to the circumstances. Cuneo *v.* De Cuneo, 24 Tex. Civ. App. 436, 59 S. W. Rep. 284.

[97] Klein *v.* Wolfsohn, 1 Abb. N. C. 134.

For illustrations of the nature of the fraud that must be shown as a ground for divorce, see Kessler *v.* Kessler, 2 Cal. App. 509, 83 Pac. Rep. 257, and Smith *v.* Smith, 171 Mass. 404, 50 N. E. Rep. 933, 58 Am. St. Rep. 933, 58 Am. St. Rep. 440, 41 L. R. A. 800.

In Lyman *v.* Lyman, 90 Conn. 399, 97 Atl. Rep. 312, 4 L. R. A. 1916, E. 643, it was stated: "the courts are practically agreed in holding that ante-nuptial pregnancy by another man, if concealed by the wife from the husband who was himself innocent of improper relations with her, is a fraud upon him justifying a divorce or annulment of the mar-

an allegation that the woman fraudulently induced plaintiff to believe her chaste.[98] Admissions, especially if tacit, are not alone sufficient to establish fraud as a ground of divorce.[99]

3. Impotence.

The burden of proving impotence as a ground of action is on plaintiff, and increases with the lapse of time from the date of marriage to the bringing of the action.[1]

4. Adultery.

Actual marriage and cohabitation with a second spouse, is conclusive evidence of sexual intercourse.[2] Residence of man

riage as the appropriate remedy in the jurisdiction may be."

Fraudulent concealment by the defendant that she is epileptic will entitle the plaintiff to a divorce. See Gould *v.* Gould, 78 Conn. 242, 61 Atl. Rep. 604, 2 L. R. A. N. S. 531.

One who alleges that he was fraudulently induced to marry by the false representations of pregnancy made by a woman with whom he had had sexual intercourse, must show that he was actually deceived thereby. Todd *v.* Todd, 149 Pa. 60, 24 Atl. Rep. 128, 17 L. R. A. 320.

[98] Donovan *v.* Donovan, 9 Allen, 140.

See Smith *v.* Smith, 171 Mass. 404, 50 N. E. Rep. 933, 68 Am. St. Rep. 440, 41 L. R. A. 800, which approves the ruling in Reynolds *v.* Reynolds, 3 Allen, 605, to the effect that in order to maintain an action for divorce it is not necessary to introduce evidence of express representations.

[99] Montgomery *v.* Montgomery, 3 Barb. Ch. 132.

[1] M. *v.* C., L. R. 2 P. & D. 414, s. c., 4 Moak's Eng. 650.

It is necessary to allege and prove that the physical incapacity continues and appears to be incurable. Hobbs *v.* Hobbs, 10 Cal. App. 97, 101 Pac. Rep. 22; Payne *v.* Payne, 46 Minn. 467, 49 N. W. Rep. 230, 24 Am. St. Rep. 240; Anonymous, 158 N. Y. Supp. 51. As to surgical examination see Devanbagh *v.* Devanbagh, 5 Paige, 554, 28 Am. Dec. 443, 6 Id. 176; Newell *v.* Newell, 9 Id. 25; Cahn *v.* Cahn, 21 Misc. 506, 48 N. Y. Supp. 173. Where the only evidence is the conflicting testimony of the parties, the lapse of time is a very strong circumstance against the case. Cuno *v.* Cuno, L. R. 2 H. L. Sc. 300, s. c., 6 Moak's Eng. 73. As to differing effects of delay in bringing suit, see Bishop, Marr. & Div. & Sep., § 1273, Vol. II (1891).

[2] Clapp *v.* Clapp, 97 Mass. 531; McGown *v.* McGown, 19 App. Div. 368, 46 N. Y. Supp. 285, affirmed 164 N. Y. 558, 58 N. E. Rep. 1089. But proof of the second

and woman in the same house,[3] holding each other out as man and wife, is not necessarily *prima facie* evidence of it.[4]

Birth of a child, or pregnancy, is not evidence of adultery without clear proof of the husband's non-access,[5] by witnesses who have means of knowledge.[6]

A husband's consorting with *prostitutes* is competent as evidence of his adultery.[7] A woman's visiting a house of prostitution with a man other than her husband is competent evidence of her adultery.[8] Continuation of an intercourse

marriage alone is insufficient to show adultery. Taylor *v.* Taylor, 108 N. Y. Supp. 428, 123 App. Div. 220.

[3] Pollock *v.* Pollock, 71 N. Y. 137.

But where a married woman without her husband's knowledge called frequently at the boarding house of another man, having held herself out to be the wife of such man, and remained in his bed-room hours at a time, the court held that this was sufficient evidence of adultery to entitle her husband to a divorce. Graham *v.* Graham, 50 N. J. E. 701, 25 Atl. Rep. 358.

[4] Hart *v.* Hart, 2 Edw. 207. But see Hoffm. on Ref. 115. Mere proof that the suspected parties are reputed to be husband and wife is not deemed sufficient. Stiefel *v.* Stiefel, 35 Atl. Rep. (N. J. Ch.) 287. As to presumption of death from absence, see Chapter V, paragraph 3 of this vol.

[5] Van Aernam *v.* Van Aernam, 1 Barb. Ch. 375. See Chapter V, paragraphs 29 *et seq.* of this vol.

Unless the non-access is proved beyond beyond a reasonable doubt the presumption continues that the child is legitimate. Timmann *v.* Timmann, 142 N. Y. Supp. 298.

[6] See Turney *v.* Turney, 4 Edw. 566, and chapter V, paragraph 33 of this vol. By N. Y. Rules Prac. 75; legitimacy, if not questioned in pleading, cannot be questioned on the trial.

The husband, however, is not competent to testify as to non-access. Taylor *v.* Taylor, 123 App. Div. 220, 108 N. Y. Supp. 428; Timmann *v.* Timmann, 142 N. Y. Supp. 298.

[7] But whether sufficient, depends on evidence of disposition and opportunity. See Ciocci *v.* Ciocci, 26 Eng. Law & Eq. R. 604; Platt *v.* Platt, 5 Daly, 295; Van Epps *v.* Van Epps, 6 Barb. 320, Hoffm. on Ref. 155.

Evidence that the defendant visited houses of ill-fame and in his wife's absence permitted two prostitutes to stay at his house all night was deemed sufficient to show adultery. Abel *v.* Abel, 89 Iowa, 300, 56 N. W. Rep. 442. See also Cooke *v.* Cooke, 71 Ill. App. 663.

[8] In Cane *v.* Cane, 30 N. J. Eq. 148, such visitation by a married woman was held to be conclusive

formerly adulterous, without anything to indicate a change, will sustain an inference of continued adultery.[9] A husband's having the venereal *disease*, long after marriage, is *prima facie* evidence of his adultery.[10] Defendant's physician is not competent as to facts derived from him in professional confidence.[11] The wife's disease is not evidence of the husband's infidelity.[12]

evidence of adultery. The decision in this case was followed in Stackhouse *v.* Stackhouse, 36 Atl. Rep. (N. J. Ch.) 884.

There are cases in Kentucky and New York holding that proof merely of the visit to a house of ill fame by the defendant is not sufficient evidence to prove the adultery. Locke *v.* Locke, 18 S. W. (Ky.) 233; Platt *v.* Platt, 5 Daly (N. Y.), 295. In Van Name *v.* Van Name, 49 Hun, 264, 2 N. Y. Supp. 77, contrary to previous decisions, it was held that there was a presumption of adultery sufficient to entitle the plaintiff to a divorce where a visit to a house of ill fame was proved.

Evidence that a husband went to a brothel and remained there all night is sufficient. Cooke *v.* Cooke, 152 Ill. 286, 38 N. E. Rep. 1027. But evidence that defendant visited a brothel two months after the suit for divorce was brought, is inadmissible. Johanson *v.* Johanson, 12 Cal. App. 635, 108 Pac. Rep. 55.

[9] Smith *v.* Smith, 4 Paige, 432; Van Epps *v.* Van Epps, 6 Barb. 320.

But proof of a meretricious relationship before marriage is not considered sufficient evidence to support an inference of its continuance after marriage. Razor *v.* Razor, 42 Ill. App. 504.

[10] Johnson *v.* Johnson, 14 Wend. 637, rev'g 4 Paige, 460. Compare Ferguson *v.* Ferguson, Seld. Notes, 249 (No. 6, p. 77), modifying effect of 1 Barb. Ch. 604, 3 Sandf. 307.

The evidence was held sufficient to prove adultery where it was shown that the husband frequented houses of ill fame at about the same time that he contracted a loathsome venereal disease. Laycock *v.* Laycock, 52 Or. 610, 98 Pac. Rep. 487.

[11] N. Y. Code Civ. Pro., § 834; Hunn *v.* Hunn, 1 Supm. Ct. (T. & C.) 499; and see chapter XXVI, paragraph 41 of this vol.

The refusal of the defendant's physician, on the ground of professional privilege, to answer whether defendant had a venereal disease, although it creates no presumption, is of much assistance in determining the weight of evidence. McGrail *v.* McGrail, 48 N. J. Eq. 532, 22 Atl. Rep. 582.

[12] Homburger *v.* Homburger, 46 How. Pr. 346.

In Moore *v.* Moore, 135 N. Y. Supp. 425, it was held that the adultery of a husband cannot be

5. — Circumstantial Evidence.

The evidence to authorize a divorce on the ground of adultery need not be direct, but if circumstantial, the circumstances must be such as would lead the guarded discretion of a just mind to the conclusion of the truth of the facts.[13] The circumstances are to be taken together and when combined must tend to establish the following three facts: 1. The lustful disposition of the party charged, towards the alleged paramour; 2. A like disposition on the part of the latter; 3. The opportunity to commit the act.[14] These three facts must be reasonably approximate in point of time.[15] The proof must sustain an inference of actual con-

predicated upon the mere fact that his wife is tainted with a venereal disease although she is free from suspicion of adulterous relationship.

[13] Aitchison *v.* Aitchison, 99 Iowa, 93, 68 N. E. Rep. 573; Dunham *v.* Dunham, 162 Ill. 589, 44 N. E. Rep. 841.

"From the necessities of proof in actions for divorce, the court must usually deduce from circumstantial evidence the fact of wrongful conduct on the part of the guilty party, and in considering the evidence the court must inquire whether opportunity for wrongdoing and inclination toward wrongdoing have been sufficiently proved. The elements of opportunity and inclination must both be present. The evidence as to inclination, as well as opportunity, must be such as to lead a reasonable man to the conclusion that the adulterous act has been committed." Hutchinson *v.* Hutchinson, 53 Misc. 438, 104 N. Y. Supp. 1074. See also Stiles *v.* Stiles, 167 Ill. 576, 47 N. E. Rep. 867.

[14] Westmeath *v.* Westmeath, 4 Eng. Ecc. 438; followed in Inskeep *v.* Inskeep, 5 Clarke (Iowa), 204, and Freeman *v.* Freeman, 31 Wis. 535.

See Hutchinson *v.* Hutchinson, supra.

Evidence of opportunity for carnal intercourse is of little probative force to prove adultery unless there is further evidence given of such relationship between the parties and such conduct on their part as to establish desire and willingness to commit such an act when the opportunity arose. Lunham *v.* Lunham, 133 App. Div. 215, 117 N. Y. Supp. 396. See also Stiefel *v.* Stiefel, 35 Atl. Rep. (N. J. Ch.) 287; Graham *v.* Graham, 157 App. Div. 52, 141 N. Y. Supp. 766, and Knickerbocker *v.* Worthing, 138 Mich. 224, 101 N. W. Rep. 540.

[15] In applying the rule as to desire and opportunity, caution must be observed to prevent its

nection but it is not essential that it identify time and place,[16] unless these have been made part of the issue by the pleadings.

Circumstances susceptible of a reasonable interpretation consistent with innocence, and which do not lead to guilt by a fair inference as a necessary conclusion, are insufficient.[17]

misapplication. Although not considered as an absolute rule it has been found useful in reviewing and weighing circumstantial evidence of the act of adultery. See Bishop Marr., Div. & Sep., Vol. II, § 1371. Thayer *v.* Thayer, 101 Mass. 111. Opportunity must be proved by evidence that the parties were in some place together where adultery might probably have been committed. Otherwise guilty intention might be mistaken for actual guilt. Caton *v.* Caton, 7 Notes Ecc. & Mat. Cas. 16.

[16] Hamerton *v.* Hamerton, 2 Hagg. Ecc. 8; Grant *v.* Grant, 2 Curt. Ecc. Ct. 16.

Undue and improper familiarity extending over a period of years is sufficient to support an inference of adultery. Walker *v.* Walker, 38 R. I. 362, 95 Atl. Rep. 925.

The fact of adultery may be established by proof of facts and circumstances showing inclination, opportunities and intimacy of relations, without proof of the commission of the act at any specific time or place. Krauss *v.* Krauss, 73 App. Div. 509, 77 N. Y. Supp. 203.

Bishop Marr., Div. & Sep. Vol. II, § 1353 says: "It is not necessary to prove that the adultery with which a party is charged should have occurred at any particular time and place. The court must be satisfied that a criminal attachment subsisted between the parties and that opportunities occurred when the intercourse in which it is satisfied the parties intended to indulge might with ordinary facility have taken place."

[17] Allen *v.* Allen, 101 N. Y. 658, 5 N. E. Rep. 341; Cottrell *v.* Cottrell, 165 App. Div. 693, 151 N. Y. Supp. 289; Moser *v.* Moser, 29 Ala. 313; Inskeep *v.* Inskeep (above); Ferguson *v.* Ferguson, 3 Sandf. 307. The following cases illustrate the application of this principle, by indicating, not rules of law, but situations which the courts have held would sustain a finding of fact. Great intimacy and opportunity; not proof. Faussett *v.* Faussett, 7 Notes Ecc. & Mat. Cas. 88. Kissing, letters and opportunity; not proof. Hamerton *v.* Hamerton, 2 Hagg. Ecc. 8. Intimacy, indecorous freedom, without indecent familiarities, but with opportunity; not proof. Caton *v.* Caton, 7 Notes Ecc. & Mat. Cas. 16. Willing receipt of letters of solicitation, suspicious intimacy and opportunity not proof. Hamerton *v.* Hamerton (above), approved in Caton *v.* Caton, 7 Notes Ecc. & Mat. Cas. 16. Criminal

The social habits of the parties and of the community of which they were a part,[18] and any circumstances giving an innocent character to the intimacy,[19] are relevant.

6. — Cogency of Proof.

Nothing is to be taken in favor of plaintiff by presumption or intendment, even in the case of a default.[20] The evidence must be such as would lead the guarded discretion of a reasonable and just man to the conclusion of guilt, for it is not to lead a rash and intemperate judgment, moving upon appearances that are equally capable of two interpretations, neither is it to be a matter of artificial reasoning, judging upon such things differently from what would

disposition and attempt to gain opportunity; not proof. Caton *v.* Caton (above). Opportunity alone; not proof. Hamerton *v.* Hamerton (above). Opportunity must be connected with design. Mayer *v.* Mayer, 21 N. J. Eq. (6 C. E. Green) 246. Indecent familiarities, clandestine interviews, love letters expressing desire, followed by opportunity; held to be proof. Grant *v.* Grant, 2 Curt. Ecc. Ct. 16, 71; and see Lockyer *v.* Lockyer, 1 Edm. Sel. Cas. 107.

[18] Inskeep *v.* Inskeep, 5 Clarke (Iowa), 204; Gethin *v.* Gethin, 2 Sw. & Tr. 560–3.

Where the plaintiff testified that after leaving her husband she believed that he, like other men, would associate with women for immoral purposes, it was held that she was guilty of consent and connivance and had aided and contributed in the adultery committed by him. Richardson *v.* Richardson, 114 N. Y. Supp. 912.

[19] Dunlap *v.* Robinson, 2 Ala. N. S. 100; Berckmans *v.* Berckmans, 17 N. J. Eq. (2 C. E. Green), 453, affi'g 16 Id. 122; King *v.* King, 4 Scotch Sess. Cas. 2d series, 583. See also Franey *v.* Franey, 28 App. Div. 50, 50 N. Y. Supp. 918. *Quære*, as to the right to prove the reputation of a general locality as a trysting place for immoral purposes. Lowenthal *v.* Lowenthal, 157 N. Y. 236, 51 N. E. Rep. 995.

[20] Linden *v.* Linden, 36 Barb. 61.

Rule 72 of the New York General Rules of Practice prescribes the necessary averments to support a judgment by default in a divorce action.

Section 1757, N. Y. Code Civ. Pro., further provides, that "if the defendant makes default in appearing or pleading, the plaintiff before he is entitled to judgment, must nevertheless satisfactorily prove the material allegations of his complaint."

strike the careful and cautious consideration of a discreet man.[21] It must be a conclusion so far inevitable as that the supposition of innocence cannot by any just course of reasoning be reconciled with it.[22]

[21] Lovedon *v.* Lovedon, 2 Hagg. Cons. 3; Ferguson *v.* Ferguson, 3 Sandf. 307; Freeman *v.* Freeman, 31 Wis. 235; Mosser *v.* Mosser, 29 Ala. N. S. 313; Day *v.* Day, 3 H. W. Green Ch. (N. J.) 444.

"The rule as to strength and quality of testimony required to justify a finding of guilt, when the issue in a civil action involves a crime other than adultery, should obtain when adultery is charged in an action for a divorce. That rule is that the issue should be determined by the clear and satisfactory preponderance of the evidence." Poertner *v.* Poertner, 66 Wis. 644, 29 N. W. Rep. 386.

A preponderance only of the evidence and not a clear preponderance is necessary to establish the adultery. Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. Rep. 46.

In Pittman *v.* Pittman, 72 Ill. App. 500, it was held that it was error for the judge to instruct the jury that to sustain the charge of adultery it was necessary for the proof of the adultery to be satisfactory. See also Stiles *v.* Stiles, 167 Ill. 576, 47 N. E. Rep. 867, and Baker *v.* Baker, 136 Ky. 617, 124 S. W. Rep. 866.

[22] Anon, 17 Abb. Pr. 48, and cas. cit. Proof beyond reasonable doubt is required in Berckmans *v.* Berckmans, 17 N. J. Eq. (2 C. E. Green) 453, affi'g 16 Id. 222; Freeman *v.* Freeman (above). Compare chapter XXVI, paragraph 31 of this vol. For various forms of stating the rule requiring proof beyond a mere preponderance of probability, see Miller *v.* Miller, 4 Sw. & Tr. 427; Clare *v.* Clare, 19 N. J. Eq. (4 C. E. Green) 37; Cooper *v.* Cooper, 10 La. O. S. 249; Edmond's Appeal, 57 Penn. St. 232; Caton *v.* Caton, 7 Notes Ecc. & Mat. Cas. 16; Day *v.* Day, 3 Green Ch. (N. J.) 444; Purcell *v.* Purcell, 4 Henn. & M. 511; Mehle *v.* Lapeyrollerie, 16 La. Ann. 4. It is not necessary that any one act should be proved as having occurred at any certain time and place, but the court must consider the opportunity for the commission of the act, the conduct of the parties, and all the circumstances, and then determine from the whole testimony whether it should convince an unprejudiced and cautious person of the guilt of the defendant. Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. Rep. 416. "The only question presented is the measure of proof required in a divorce proceeding to establish the cause of adultery. It is a civil proceeding to determine the relation and rights of the parties under, and to, the marriage contract. The violation of it, charged, is a crime under the laws of this state. Whatever may be the measure of proof required to establish such a charge in a civil

7. — Opinions of Witnesses.

The opinions of witnesses as to guilt or guilty intent are not competent.[23] But the impression or belief produced in the mind of the witness at the time of what he saw, may be called for by the court,[24] or on cross-examination.[25]

8. — Limits of the Issue of Adultery in Respect to Time and Place.

In connection with proof of at least improper familiarities within the time alleged, evidence of acts of adultery, with the same paramour, previous to the time alleged, is admissible to give significance to those familiarities.[26] Evidence

proceeding, in other jurisdictions, for many years, in this state, the measure of proof required, has been that adopted by the county court— a preponderance of the testimony, weighing the presumption of innocence in favor of the party accused." Lindley *v.* Lindley, 68 Vt. 421, 422, 35 Atl. Rep. 349. See also Bradish *v.* Bess, 35 Vt. 326; Stanton *v.* Simpson, 48 Vt. 628; Weston *v.* Gravlin, 49 Vt. 507.

See also Lorenson *v.* Lorenson, 155 Ill. App. 35.

[23] See Cox *v.* Whitfield, 18 Ala. 738, 741.

Witnesses must state facts, not opinions. Hull *v.* Hull, 14 Pa. Super. Ct. 520.

[24] Crewe *v.* Crewe, 3 Hagg. Ecc. 129, cited in Macq. on Marr. & Div. 213.

After testifying that he overheard certain noises and remarks in an adjoining room occupied by the defendant and the alleged paramour, a witness was allowed to give his opinion that adultery was being committed at that time. Such ruling was held to be correct inasmuch as the sounds and noises which were the subject matter of the witnesses' testimony were of such a nature that they could not be reproduced and described as they appeared to him at the time, and the facts upon which the witness was called to express his opinion were within the comprehension and understanding of ordinary persons. Carter *v.* Carter, 152 Ill. 434, 28 N. E. Rep. 948, 38 N. E. Rep. 669, affi'g 37 Ill. App. 219.

Where a witness testified that he looked through a window and saw the defendant and a man not her husband on a bed, the admission of his opinion that they were having intercourse was proper as the situation warranted the conclusion. Bizer *v.* Bizer, 110 Iowa, 248, 81 N. W. Rep. 465.

[25] See 3 Abb. New Cas. 234, note.

[26] Lockyer *v.* Lockyer, 1 Edm. Sel. Cas. 107. See Brooks *v.*

of adulterous acts subsequent to the time alleged, is not admissible because it raises no presumption that the prior familiarities were accompanied with an adulterous act within the period alleged.[27] If presumptive evidence of an act of adultery, within the period alleged, has been given, evidence of an act, with the same paramour, subsequent to the period but reasonably proximate in time, may be proved in corroboration.[28] Upon the same principles, *prima facie* proof of commission of adultery at the place alleged, may be corroborated by evidence of other acts of adultery at other

Brooks, 145 Mass. 574, 14 N. E. Rep. 777, 1 Am. St. Rep. 485 and Razor *v.* Razor, 42 Ill. App. 504. Evidence of the conduct and relations of the defendant with the paramour before defendant's marriage with the plaintiff is admissible when defendant's relations with the paramour after marriage were similar. Shufeldt *v.* Shufeldt, 86 Md. 519, 39 Atl. Rep. 416.

[27] Freeman *v.* Freeman, 31 Wis. 235. There should be leave to amend or file supplemental pleadings.

Evidence of acts of adultery committed after commencement of suit is inadmissible. Foval *v.* Foval, 39 Ill. App. 644.

But evidence of the improper relations and conduct of the parties prior and subsequent to the time when it was charged that the adultery was committed, is admissible and material to show an adulterous intent. Smith *v.* Smith, 13 N. Y. Supp. 817.

[28] See reasoning in Lawson *v.* The State, 20 Ala. N. S. 65.

The evidence is insufficient to establish the charge of adultery when no dates are given. Pessolano *v.* Pessolano, 69 N. Y. Supp. 449, 34 Misc. Rep. 16.

Admissible evidence which was not sufficient to prove the commission of adultery on a particular day is not necessarily incompetent in a subsequent suit for divorce, to prove that adultery was committed on another day. Burns *v.* Burns, 68 N. H. 33, 44 Atl. Rep. 76.

A decree for divorce was denied where the complainant failed to show whether the act of adultery was committed before or after the marriage to the defendant. Patterson *v.* Patterson, 89 Tenn. 151, 14 S. W. Rep. 485.

Evidence of acts and relations between the defendant and the co-respondent after the action was brought and approximately near to the time alleged was admissible to prove illicit desire from which it could reasonably be inferred that the parties committed the act complained of at the time alleged. Axtell *v.* Axtell, 119 N. Y. Supp. 644.

places not alleged;[29] but such evidence is not competent as an independent charge.[30]

9. — and as to Paramour.

An allegation of adultery with a person named, is not sustained by proof of adultery with another person,[31] or with a person unknown;[32] but, under an allegation of adultery with a person unknown, or of adultery with a person named and others unknown (with proper allegations of inability to state name), adultery with a person not named, whether known or unknown, may be proved.[33]

10. — Delay.

The husband's delay to proceed after having what he

[29] Thayer *v.* Thayer, 101 Mass. 111.

A complaint in a divorce action is sufficient where it alleges a course of adulterous conduct with a certain person covering more than two months in time and occurring in four different localities, the particular periods of time during which the defendant was at the towns and cities being mentioned in the pleading though it did not name or describe the particular places or houses where the acts were committed. Wilkerson *v.* Wilkerson, 3 Cal. App. 204, 84 Pac. Rep. 784.

[30] Green *v.* Green, 26 Mich. 437.

[31] Hahn *v.* Hahn, 136 Ill. App. 301. See cases cited and limited in Mitchell *v.* Mitchell, 61 N. Y. 398.

[32] Bokel *v.* Bokel, 3 Edw. 376.

Similarly an allegation that the defendant committed adultery with a male person named in the complaint is not supported by evidence which does not disclose the identity of the man with whom the offense proved was committed. Mondano *v.* Mondano, 122 N. Y. Supp. 731.

[33] Mitchell *v.* Mitchell, 61 N. Y. 398; Stone *v.* Stone, 13 Atl. Rep. (N. J.) 245.

Where in opposition to a motion that the allegations of adultery in a complaint which omitted to state the dates, places at which and the persons with whom the acts in question were committed be made more definite and certain, the complainant made affidavit that she was unable to give more particular designation, it was held that the motion was improperly denied since the complainant failed to show that she had no means of obtaining the information or that she had made efforts to do so and failed. Woog *v.* Woog, 58 App. Div. 620, 69 N. Y. Supp. 555.

claims as proof, is strong evidence in the wife's favor.[34] The wife's delay is not equally strong evidence.[35] Aversion to publicity or to involving children, does not excuse the husband's delay, as it does the wife's.[36] Explanations of delay are admissible.[37]

11. — Character.

The defendant's character is not in issue.[38] But unquestionably good character appearing incidentally from otherwise competent evidence, may be considered as a circumstance in defendant's favor, aiding the presumption of innocence.[39] The unchaste character of a servant employed for household purposes, is not alone competent.[40]

12. Cruelty.

The mode of proving facts such as constitute cruelty

[34] Berckmans *v.* Berckmans, 16 N. J. Eq. (1 C. E. Green) 122, affi'd in 17 Id. 435; Frost *v.* Frost, 85 N. J. Eq. 571, 96 Atl. Rep. 1010.

[35] Newman *v.* Newman, L. R. 2 Pr. & D. 157.

[36] Cummins *v.* Cummins, 15 N. J. Eq. (2 McCarter) 138.

[37] Leary *v.* Leary, 18 Geo. 696. See Bishop Marr., Div. & Sep., Section 1273, Vol. II (1891).

[38] Humphrey *v.* Humphrey, 7 Conn. 116; Washburn *v.* Washburn, 5 N. H. 195; Lockyer *v.* Lockyer, 1 Edm. Sel. Cas. 107.

Evidence of previous character and reputation for chastity and virtue is inadmissible. Talley *v.* Talley, 29 Pa. Sup. Ct. 535. In this case the court gives a general review of the cases in Pennsylvania dealing with the admissibility of such evidence in other civil cases. See also Sullivan *v.* Sullivan, 92 Me., 84, 42 Atl. Rep. 230.

But it has been held that the allegations of a complaint in a divorce action sufficiently put in issue the defendant's character to permit her to introduce evidence of her good character. DuBose *v.* DuBose, 75 Ga. 753; Hilker *v.* Hilker, 153 Ind. 425, 55 N. E. Rep. 81; Warner *v.* Warner, 69 N. H. 137, 44 Atl. Rep. 908.

[39] Alexander *v.* Alexander, 2 Sw. & Tr. 95; Warner *v.* Warner, 69 N. H. 137, 44 Atl. Rep. 908.

[40] Carter *v.* Carter, 62 Ill. 439.

Where the defendant is charged with committing adultery with his house-keeper and opportunities are shown, the good character of the latter is a matter of material consideration in reviewing the testimony. Pullen *v.* Pullen, 20 Atl. Rep. (N. J. Ch.) 215.

and their effects, has been stated in other chapters.[41] Defendant's conviction on a plea of guilty,[42] or his plea of guilty [43] to an indictment for cruelty, is competent against him; but a conviction on a plea of not guilty is not.[44] A defendant offering to prove, in his justification, plaintiff's ill-conduct, is restricted to what proceeded or was contemporaneous with his own cruelty or misconduct.[45]

13. Witnesses.

The competency of the parties has been stated.[46] Plaintiff's testimony alone may, in the discretion of the court, in a perfectly clear case, be sufficient if other evidence does not exist or cannot be obtained.[47] A child, if of a competent

[41] Chapter VI, paragraph 25, chapter XXXI, paragraph 45, chapter XL, paragraph 6, chapter XLV, paragraph 6, and chapter XLVI, paragraph 1 of this vol.

[42] Greenl. Ev. (13th ed.) 570, § 527*a*, note.

[43] Chapter XL, paragraph 5 of this vol.

[44] Id.

[45] Bihin *v.* Bihin, 17 Abb. Pr. 19.

It is proper that other acts of cruelty occurring subsequently to the commencement of the action be alleged in a supplemental complaint. It is for the court to say whether the acts are of so recent a date as to be pertinent. Scotland *v.* Scotland, 4 Wash. 118, 29 Pac. Rep. 930.

[46] A husband is forbidden to testify to material facts tending to establish the charge of adultery alleged by him in his complaint to have been committed by his wife. Colwell *v.* Colwell, 14 N. Y. App. Div. 80. Where the charges of adultery in the complaint are put in issue by the answer, and counter allegations of adultery on the part of the plaintiff are made and the issues are tried together, the reception of testimony of the plaintiff, incompetent as to the issues presented upon the charges in the complaint, but competent upon the issues presented by the counter charges in the answer, is not error. McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. Rep. 288.

[47] Robbins *v.* Robbins, 100 Mass. 150; Kaiser *v.* Kaiser, 16 Hun, 602, 605. Compare U. *v.* J., L. R. 1 Pr. & M. 460. See N. Y. Code Civ. Pro., § 831.

In some states it is a general rule not to grant a divorce on the uncorroborated evidence of the plaintiff. Herold *v.* Herold, 47 N. J. Eq. 210, 20 Atl. Rep. 375, 9 L. R. A. 696; Lewis *v.* Lewis, 75 Iowa, 200, 39 N. W. Rep. 271; Rie *v.* Rie,

age and intelligence to be a witness, may testify against its parent.[48] Testimony of a prostitute,[49] or an alleged paramour,[50] or the keeper or a servant of a house of prosti-

34 Ark. 37. It is not necessary that the plaintiff's testimony be corroborated as to every fact and circumstance testified to. Cooper *v.* Cooper, 88 Cal. 45, 25 Pac. Rep. 1062. The plaintiff's testimony is not sufficiently corroborated by the defendant's admissions though made to a third person. Scarborough *v.* Scarborough, 54 Ark. 20, 14 S. W. Rep. 1098.

Contra, Krug *v.* Krug, 22 Pa. Sup. Ct. 572, 574. The uncorroborated testimony of the wife regarding the misconduct of her husband may support a decree where the defendant neglects to take the stand or explain the charges. Sylvis *v.* Sylvis, 11 Col. 319, 17 Pac. Rep. 912.

[48] Lockwood *v.* Lockwood, 2 Curteis, 81. The omission to call a child of tender years is approved in Kneale *v.* Kneale, 28 Mich. 344, COOLEY, J.; S. P., Tobey *v.* Leonards, 2 Wall, 423, WAYNE, J.

In Draper *v.* Draper, 68 Ill. 17, a child nine years old was permitted to testify in behalf of its mother, the complainant, the court being satisfied that she understood the nature and effect of an oath.

A divorce on the ground of adultery will not be granted on the uncorroborated testimony of two children of the parties as to the adulterous conduct of their mother. Crowner *v.* Crowner, 44 Mich. 180, 6 N. W. Rep. 198, 38 Am. Rep. 245. See also Malone *v.* Malone, 76 Ark. 28, 88 S. W. Rep. 840.

[49] Turney *v.* Turney, 4 Edw. Ch. 566. Compare Ciocci *v.* Ciocci, 26 Eng. L. & Eq. 604, S. C., 18 Jur. 194. While the uncorroborated evidence of prostitutes alone is insufficient to sustain a charge of adultery in an action for divorce, yet slight corroboration is sufficient where the defendant fails to take the stand in his own behalf. McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. Rep. 288; Winston *v.* Winston, 34 N. Y. App. Div. 460.

[50] Ginger *v.* Ginger, L. R. 1 Pr. & D. 37, and see Simons *v.* Simons, 13 Tex. 558.

But see Letts *v.* Letts, 79 N. J. Eq. 630, 82 Atl. Rep. 845, Ann. Cas. 1913, A. 1236 where the court stated: "There seems to be no conclusive reason why a decree for divorce may not be granted upon the uncorroborated testimony of a paramour provided he is a credible witness and his story worthy of belief. There appears to be no valid reason why a different rule of law should exist governing the testimony of a paramour in a divorce case, than the one relating to the testimony of a *particeps criminis* in a criminal prosecution."

Where direct evidence is given of the defendant's adultery which is denied by her testimony, her failure to call the alleged paramour

tution,[51] is not sufficient to prove adultery. That of a witness employed to watch and detect is not incompetent, but is to be received with great caution and scrupulously scrutinized.[52] At least two witnesses are generally required.

Satisfactory testimony of the defendant and the alleged paramour, to their innocence, though of little weight against clear proof, should prevail against merely circumstantial evidence or unsatisfactory testimony making a doubtful case.[53]

14. Confessions and Admissions.

A confession, not connected with other proof, is not competent.[54] However explicit, it will not alone justify a

as a witness to give testimony on the point in dispute where his testimony is available, creates a strong presumption against her. Kenyon *v.* Kenyon, 88 Hun, 211, 34 N. Y. Supp. 720.

But the defendant may show that the testimony of the alleged paramour is not available. Pond *v.* Pond, 132 Mass. 219.

[51] Platt *v.* Platt, 5 Daly, 295, 297.

A finding that the defendant committed adultery may be based upon the testimony of an inmate of a brothel corroborated by the testimony of the proprietress thereof. Mott *v.* Mott, 3 App. Div. 532, 38 N. Y. Supp. 261.

[52] Anon., 17 Abb. Pr. 48.

"The testimony of a professional detective is, in divorce cases, to be subjected to close scrutiny and received with great caution, but is not to be unceremoniously thrown out. If corroborated by the testimony of other witnesses or by circumstances, and it is consistent and not grossly improbable, it should be accorded due weight." McGrail *v.* McGrail, 48 N. J. Eq. 532, 22 Atl. Rep. 582; Chapman *v.* Chapman, 129 Ill. 386, 21 N. E. Rep. 806.

A motion to confirm the report of a referee in the plaintiff's favor was denied because of the failure of the uncorroborated testimony of a hired detective to sustain the charge of adultery. Enders *v.* Enders, 83 Misc. 593, 145 N. Y. Supp. 450.

[53] Mayer *v.* Mayer, 21 N. J. Eq. 240; Larrison *v.* Larrison, 20 Id. 100.

[54] Doe *v.* Roe, 1 Johns. Cas. 25; Betts *v.* Betts, 1 Johns. Ch. 197; Miller *v.* Miller, 1 H. W. Green Ch. (N. J.) 139; Searle *v.* Price, 2 Hagg. Cons. 189; Macqueen's Pr. in H. of L. 606, 1 Tayl. Ev. 673, and see White *v.* White, 45 N. H. 121. *Contra*, Sheffield *v.* Sheffield, 3 Tex. 79; Williams *v.* Williams, 35 L. J. Mat. C., s. c., 8 L. R. 1

decree;[55] but may, in the discretion of the court, be sufficient when clearly proved, if accompanied with evidence effectually repelling all suspicion of collusion,[56] or corroborated by other evidence of guilt,[57] and free from any appear-

Pr. & D. 29, 13 L. T. R. N. S. 610; Robinson *v.* Robinson, 1 Sw. & Tr. 562; Vance *v.* Vance, 8 Greenl. (Me.) 132. Evidence of confessions of adultery in a divorce action has been held inadmissible for any purpose whatever. Trough *v.* Trough, 59 W. Va. 464, 53 S. E. Rep. 630, 115 Am. St. Rep. 940, 4 L. R. A. N. S. 1185, 8 Ann. Cas. 837; Johanson *v.* Johanson, 12 Cal. App. 635, 108 Pac. Rep. 55; Hayes *v.* Hayes, 144 Cal. 625, 78 Pac. Rep. 19.

In Summerbell *v.* Summerbell, 37 N. J. Eq. 603, considered to be the leading case on this question in New Jersey, the court held that confessions are not in and of themselves conclusive and that unless strongly corroborated cannot be made the basis of a decree. Howard *v.* Howard, 77 N. J. Eq. 186, 78 Atl. Rep. 195. The corroboration need not be sufficient standing by itself to prove the act of adultery but must tend to substantiate the facts in the confession. Monypeny *v.* Monypeny, 171 App. Div. 134, 157 N. Y. Supp. 11.

See § 1735, N. Y. Code Civ. Pro.

[55] Lyon *v.* Lyon, 62 Barb. 138, and cases above cited. By the N. Y. Code Civ. Pro., § 1753, "the declaration or confession of either party to the marriage is not alone sufficient as proof." But the rule is not dependent on the statute, but is one of public policy. True *v.* True, 6 Minn. 458. On the infirmity of evidence of confessions, see Lench *v.* Lench, 18 Ves. 511; Smith *v.* Burnham, 3 Sumn. 435, 1 Greenl. on Ev. (Redf. ed.) 229, § 200; State *v.* Fields, Peck (Tenn.), 141; Malin *v.* Malin, 1 Wend. 625, 652; Getman *v.* Getman, 1 Barb. Ch. 499, 504; Law *v.* Merrills, 6 Wend. 268, rev'g 9 Cow. 65; Garrison *v.* Aiken, 2 Barb. 25, 27; Rex *v.* Simons, 6 C. C. & P. 541; Rex *v.* Coleman, Remarkable Trials, 1162, cited in Joy on Confessions, 108.

See Kloman *v.* Kloman, 62 N. J. Eq. 153, 49 Atl. Rep. 810, where the confessions of adultery contained in convincing form in letters by the defendant to her friend were held insufficient evidence to support a decree for divorce.

[56] Billings *v.* Billings, 11 Pick. 461; Fullerton *v.* Fullerton, 11 Scotch Ct. of Sess. Cas., 3d series, 720; Armstrong *v.* Armstrong, 32 Miss. 279; Madge *v.* Madge, 42 Hun (N. Y.), 524.

[57] Clark *v.* Clark, 86 Minn. 249, 90 N. W. Rep. 390. Cases above; Clutch *v.* Clutch, 1 Saxt. N. J. 474; Lyon *v.* Lyon, 62 Barb. 138; Sawyer *v.* Sawyer, Walk. Ch. 52; Baxter *v.* Baxter, 1 Mass. 346; Matchin *v.* Matchin, 6 Penn. St. 332.

ance of collusion.[58] A confession in ambiguous language suggestive of guilt, but consistent with there having been no actual adultery, is not enough;[59] but is competent, and may be sufficient, in connection with other proof.[60]

Confessions or declarations by the alleged paramour are no evidence against the defendant,[61] unless brought to the knowledge of defendant and proved as a foundation for showing defendant's tacit or express confession.[62] Admissions or declarations of a third person, though made when acting for the defendant, are not competent as a confession unless shown to have emanated from the defendant.[63]

If the confession or admission received, is contained in a writing, the party against whom a part is read has a right to have the whole put in evidence.[64]

15. Condonation.

Condonation may be proved by the voluntary cohabitation of the parties, with the knowledge of the fact of

[58] Doe *v.* Roe, 1 Johns. Cas. 25, Hoffm. on Ref. 157; Michalowicz *v.* Michalowicz, 25 App. Cas. D. C. 484; Kloman *v.* Kloman, 62 N. J. Eq. 153, 49 Atl. Rep. 810.

[59] Winscome *v.* Winscome, 3 Sw. & Tr. 380; Williams *v.* Williams, 1 Hagg. Cons. 302; Caton *v.* Caton, 7 Notes of Ecc. & Mat. Cas. 16.

[60] Faussett *v.* Faussett, 7 Notes of Ecc. & Mat. Cas. 88; Grant *v.* Grant, 2 Curt. Ecc. 16.

[61] Montgomery *v.* Montgomery, 3 Barb. Ch. 132; Leary *v.* Leary, 18 Geo. 696; Hobby *v.* Hobby, 64 Barb. 277; Budd *v.* Budd, 55 App. Div. 113, 67 N. Y. Supp. 43; Delling *v.* Delling, 34 Misc. Rep. 122, 69 N. Y. Supp. 479.

[62] Burgess *v.* Burgess, 2 Hagg. Cons. 223; Croft *v.* Croft, 3 Hagg. Ecc. 310; Kloman *v.* Kloman, 62 N. J. Eq. 153, 49 Atl. Rep. 810.

[63] Faussett *v.* Faussett, 7 Notes Ecc. & Mat. Cas. 88.

[64] Forrest *v.* Forrest, 6 Duer, 102, 132 affi'd in 25 N. Y. 501, As to correspondence, see chapter XLIV, paragraph 2 of this vol.

Admissions in a letter written by defendant are inadmissible as evidence. Lenning *v.* Lenning, 176 Ill. 180, 52 N. E. Rep. 46.

When letters written by the corespondent to the defendant are admissible as evidence, they are not sufficient evidence unless it is shown that improper suggestions therein contained were acted upon. Jones *v.* Jones, 124 Ill. App. 201.

adultery.[65] Condonation may be conditional. Cohabitation is not conclusive proof of condonation of cruelty.[66]

[65] 2 N. Y. Code Civ. Pro., § 1758. And this is conclusive. See Sewall *v.* Sewall, 122 Mass. 156, s. c., 23 Am. Rep. 299; Reynolds *v.* Reynolds, 4 Abb. Ct. App. Dec. 35. Where the case is litigated, it is not incumbent upon the plaintiff to make affirmative proof of the allegations inserted in the complaint in compliance with the rules of the Supreme Court, *i. e.*, that the adultery charged was "without the consent, privity or procurement of the plaintiff," and that the latter has not voluntarily cohabited with defendant since discovery of the fact; these are matters of affirmative defense. It is only to provide for a case of defendant suffering a default that these possible defenses are required to be negatived by plaintiff by verified complaint or affidavit. McCarthy *v.* McCarthy, 143 N. Y. 235, 38 N. E. Rep. 288.

Condonation is the remission or forgiveness by one of the married parties of an offense he knows the other has committed against the marriage. 2 Bishop Marr. & Div., § 269; Owens *v.* Owens, 96 Va. 191, 31 S. E. Rep. 72; Gardner *v.* Gardner, 9 N. Dak. 192, 82 N. W. Rep. 872.

It is not available as a defense unless pleaded. Delaney *v.* Delaney, 69 N. J. Eq. 602, 61 Atl. Rep. 266 rev'd 71 N. J. Eq. 246, 65 Atl. Rep. 217; Breedlove *v.* Breedlove, 27 Ind. App. 560, 61 N. E. Rep. 797.

There can be no condonation without knowledge. Laycock *v.* Laycock, 52 Or. 610, 98 Pac. Rep. 487.

There is condonation where a husband has sexual intercourse with his wife, having knowledge and means of proving her adultery; forgiveness is not necessary. Rogers *v.* Rogers, 67 N. J. Eq. 534, 58 Atl. Rep. 822; Karger *v.* Karger, 19 Misc. 236, 44 N. Y. Supp. 219.

[66] Reynolds *v.* Reynolds (above); and see Perkins *v.* Perkins, 6 Mass. 69.

See also McClanahan *v.* McClanahan, 104 Tenn. 217, 56 S. W. Rep. 858, Merrill *v.* Merrill, 41 App. Div. 347, 58 N. Y. Supp. 503, 9 L. R. A. 699.

If the original wrong which has been condoned is subsequently repeated, the condonation is not a bar to an action for divorce. Craig *v.* Craig, 129 Iowa, 192, 105 N. W. Rep. 446, 2 L. R. A. N. S. 669; Atherton *v.* Atherton, 82 Hun, 179, 31 N. Y. Supp. 977.

CHAPTER LIII

ACTIONS OF QUO WARRANTO

1. Office.
2. Corporations.

1. Office.

The claimant to office must show a good title, not a colorable one, nor one resting upon his own neglect.[67] If he

[67] People ex rel. Garmo *v.* Bartlett, 6 Wend. 422.

An information in the nature of *quo warranto* puts the respondent to his proofs to show by what warrant he is exercising certain privileges and a plea of not guilty or *non usurpavit* is not an answer to the information. People *v.* Central Union Tel. Co., 232 Ill. 260, 83 N. E. Rep. 829.

"The burden is upon the respondent to show a complete title to the office in dispute, otherwise judgment of ouster must be rendered against him." State *v.* Hatch, 82 Conn. 122, 72 Atl. Rep. 575.

By the common law, an information in the nature of *quo warranto* was solely a prerogative remedy for the protection of public rights; but by statute the remedy is given for the enforcement of private rights as well, and hence it is not within the arbitrary discretion of the state's attorney whether or not he will institute *quo warranto;* upon proper facts showing *prima facie* that the relator is entitled to relief, the duty of the state's attorney to apply for leave to file an information is absolute, and he will be compelled to do so by mandamus. People *v.* Healy, 230 Ill. 280, 82 N. E. Rep. 599, 15 L. R. A. N. S. 603. See also Duffield *v.* Ashurst, 12 Ariz. 360, 100 Pac. Rep. 820.

The decision of one attorney general, after a hearing, not to institute *quo warranto* on behalf of the people does not make the question *res judicata* so as to prevent a succeeding attorney general from instituting such proceeding on the same facts and against the same person. People *v.* McClellan, 188 N. Y. 618, 81 N. E. Rep. 1171, affi'g 118 App. Div. 177, 103 N. Y. Supp. 146.

An information in the nature of a *quo warranto* must be signed by the prosecuting attorney, otherwise it will not lie. State *v.* Taylor, 208 Mo. 442, 106 S. W. Rep. 1023, 13 Ann. Cas. 1058.

The remedy by *quo warranto* will not be given where any other adequate relief is available. Ma-

claims by appointment, the title of the appointing power must be shown.[68] Preliminary explanation is not required of an alteration in a public document produced from the custody of the proper officer.[69]

lone *v.* New York, etc., R. Co. (Mass.), 83 N. E. Rep. 408.

An information which avers in general terms that the respondent usurped a certain office is sufficient. Frost *v.* State, 153 Ala. 654, 45 So. Rep. 203.

Since in North Carolina a public administrator is not an officer, *quo warranto* will not lie to inquire into the authority by which a person performs the functions of such an administrator. Wooton *v.* Smith, 145 N. C. 476, 59 S. E. Rep. 649.

One who is licensed to sell intoxicating liquors is not an office holder, and his right to sell liquor cannot be attacked by *quo warranto*. State *v.* Gibbs, 82 Vt. 526, 74 Atl. Rep. 229, 24 L. R. A. N. S. 555, 18 Ann. Cas. 525.

Under the revised charter of the City of Boston, the school committee has full authority to decide questions relative to the qualifications and election of its respective members, and the decision of the committee is final and cannot be revised by the court, even when a petitioner is denied membership on the sole ground that she is a woman. Peabody *v.* Boston, 115 Mass. 383.

[68] People ex rel. Steinert *v.* Anthony, 6 Hun, 142. For the mode and effect of resignation and of revocation of it, see State *v.* Ferguson, 31 N. J. L. 107; State *v.* Hauss, 43 Ind. 105; State *v.* Fitts, 49 Ala. 402; also Stainingner *v.* Andrews, 3 Nev. 566; Marbury *v.* Madison, 1 Cranch, 137.

When one seeks by *quo warranto* to establish his right to the office of clerk of a district court by virtue of an appointment to the office, he must prove that the judge making the appointment was, at the time, lawfully holding the place as justice of the court with appointing power. The fact that the latter claimed to be the justice and was in fact so acting when he made the appointment is insufficient to establish the district clerk's claim. People *v.* Anthony, 6 Hun, 142.

Parol evidence tending to show the appointment of a public officer is inadmissible, when the statute requires the appointment to be written. State *v.* Meder, 22 Nev. 264, 38 Pac. Rep. 668.

[69] People ex rel. Stone *v.* Minck, 21 N. Y. 539; Devoy *v.* Mayor, &c. of N. Y., 35 Barb. 264, s. c., 22 How. Pr. 226.

An information in the nature of *quo warranto* is, under the statutes, a pleading and is demurrable for failure to set up the matters required by statute. Where the code sets out in detail a system of proceedings in *quo warranto*, such system supplants the common law system. Louisville, etc., R. Co. *v.* State, 154 Ala. 156, 45 So. Rep. 296.

The *election* return of the local canvassers is competent evidence of the number of votes cast.[70] But no canvasser's certificate is conclusive; it may be disproved,—for instance, by proof that votes were improperly registered or received at the election.[71] And for this purpose oral evidence is competent.[72] He who impeaches the certificate must show that the votes were untruly canvassed, or that some facts exist which show that the certificate does not truly state the result of the popular will. It is not enough to show irregularities in the constitution of the board of inspectors, or

[70] Upon general principles, even though there be no express statute. People ex rel. Stone *v.* Minck, 21 N. Y. 539. Otherwise of a town clerk's certificate. People *v.* Cook, 14 Barb. 259, affi'd in 8 N. Y. 67.

But "it is well settled that the duties of canvassing officers are purely ministerial and extend only to the casting up of votes, and awarding the certificates to the persons having the highest number; they have no judicial power." Dalton *v.* State, 43 Oh. State, 652, 3 N. E. Rep. 685.

[71] People *v.* Cook (above); People *v.* Van Slyck, 4 Cow. 297; People *v.* Vail, 20 Wend. 12. Otherwise of minutes of town meeting, kept by the town clerk pursuant to requirement of law. If erroneous, they must be corrected by a direct proceeding. People *v.* Zeyst, 23 N. Y. 140, and cases cited, 1 Dill. M. C. 350, § 236. As to the power of the clerk or board to amend the records, see 1 Dill. M. C. 346, §§ 233, 234.

"The court will go behind the certificate of the canvassers, and adjudge the office to the person who has in fact received a plurality of the legal votes therefor." State *v.* Pierpont, 29 Wis. 608.

The failure on the part of the board of canvassers to canvass the votes and issue a certificate of election was held fatal to the right to hold office. State *v.* Meder, 22 Nev. 264, 38 Pac. Rep. 668.

It has been held in Kansas that a board of canvassers should not pass upon and determine questions of illegal voting or fraud. Brown *v.* Jeffries, 42 Kan. 605, 22 Pac. Rep. 578.

[72] People ex rel. Stemmler *v.* McGuire, 2 Hun, 269, 274, 277, s. c., 4 Supm. Ct. (T. & C.) 658, affi'd in 60 N. Y. 640.

In an attempt to oust the incumbent of a village office, where subsequent to the election non-residents made an investigation to establish the fact that illegal votes were cast and that certain parties who had voted could not be found, the testimony of these non-residents was held to be hearsay evidence and of very little value. But testimony of some of those who voted to the effect that they had illegally voted is ad-

the mode of receiving votes, etc., if no illegal votes were received, and no legal ones were excluded.[73] This burden is on him, even though it require proving a negative.[74] The certificate may be contradicted by producing the ballots, if it appear that they have been preserved in the manner and by the officers prescribed in the statute, and that, while in such custody, they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with.[75] Writ-

missible. State *v.* Rosenthal, 123 Wis. 442, 102 N. W. Rep. 49.

[73] People *v.* Cook, 8 N. Y. 67, affi'g 14 Barb. 259.

One who was declared elected by the board of canvassers and who holds office under this declaration is presumed to have received the number of votes certified to. It is only when competent evidence is interposed rebutting this presumption that the burden of proving that the greater number of votes were cast for him is thrown on the party holding office under the canvasser's declaration. State *v.* Rosenthal, 123 Wis. 442, 102 N. W. Rep. 49.

When a petition for leave to file an information in *quo warranto* alleged illegal voting, marked ballots and fraud, and the supporting affidavits were no stronger than the allegations of the petition, it was rightfully held that the relator swore to conclusions only and that the petition was properly denied. Boucha *v.* Alger, Cir. Judge, 159 Mich. 610, 124 N. W. Rep. 532.

[74] People ex rel. Smith *v.* Pease, 27 N. Y. 45, s. c., 25 How. Pr. 495, affi'g 30 Barb. 588. See People *v.* Platt, 50 Hun, 454, 5 N. Y. Supp. 367.

"The rule, without exception, is that where a party institutes an action of this kind (*quo warranto*), to obtain possession of an office held by another, the facts showing his title to the office must be stated in his petition and the burden is upon him to establish his right thereto." State *v.* Davis, 64 Neb. 499, 90 N. W. Rep. 232.

But it has been held that where the defendant admitted in his answer that on the face of the returns the plaintiff was elected, but also set up fraud and illegal voting, the burden of the issue was shifted to the defendant. Brown *v.* Jeffries, 42 Kan. 605, 22 Pac. Rep. 578.

[75] Hudson *v.* Solomon, 19 Kans. 177, s. c., 16 Alb. L. J. 349.

Where the right of the respondent to an office was attacked by the relator who, on motion, asked the court to appoint two parties to open the ballot boxes, recount the votes and report the results, and this was resisted by the respondent but subsequently his opposition was withdrawn, and no bill of exceptions was made, it was held

ing, on the ballot, controls print.[76] To show that one voted, the poll list is admissible, though not authenticated nor filed.[77] A voter may testify, as a witness, how he voted.[78] If he refuses to disclose, or fails to remember, for whom he voted, circumstantial evidence is competent to raise a presumption as to that fact.[79] The declarations of a voter, although hearsay, are received on the question of his qualification, for the purpose of sustaining or annulling his vote, but not to set aside the election on other grounds.[80] One, alien born, who voted, must be presumed to have been naturalized, in absence of evidence to the contrary;[81] but if there is *prima facie* evidence that he was never naturalized, the burden is shifted.[82]

Defendant cannot have judgment for the office by show-

that the respondent must abide by the court's order even though it appeared that the ballot boxes had been accessible to the relator and his friends. It did not appear, however, that the boxes had been tampered with. Davis *v.* State, 75 Texas, 420, 12 S. W. Rep. 957.

[76] People *v.* Saxton, 22 N. Y. 309. As to pasters, see People ex rel. Gregory *v.* Love, 63 Barb. 535.

[77] People ex rel. Smith *v.* Pease, 27 N. Y. 45, s. c., 25 How. Pr. 495, affi'g 30 Barb. 588.

[78] State *v.* Rosenthal, 123 Wis. 442, 102 N. W. Rep. 49.

But see Davis *v.* State, 75 Texas, 420, where it is held that the declarations of voters made subsequent to the election are not admissible to show they are not qualified as voters. People ex rel. Judson *v.* Thacher, 55 N. Y. 525, reported below in 7 Lans. 274, s. c., 1 Supm. Ct. (T. & C.) 158. But his intention is to be learned, not from his testimony to the mental purpose, but by a reasonable construction of his acts. People *v.* Saxton, 22 N. Y. 309.

[79] People ex rel. Smith *v.* Pease (above).

"But if from the face of the ballot, the intention be doubtful, then evidence of the circumstances under which it was made out, if calculated to throw light upon the intention, should be admitted." Davis *v.* State, 75 Texas, 420, 12 S. W. Rep. 957.

[80] Id.

[81] Id. Parol evidence is not admissible to impeach the record of naturalization by showing that the preliminary steps were not taken. People ex rel. Brackett *v.* McGowan, 77 Ill. 644, s. c., 20 Am. Rep. 254.

[82] People ex rel. Smith *v.* Pease (above).

ing possession in himself, even though the relator fail to prove title.[83]

2. Corporations.

If the proceeding, founded on alleged usurpation of power, is by the State, not on the relation of a private person, the burden of proof is on the defendant to disclaim or to justify, and the State is not bound to make affirmative proof.[84] If the corporation is shown once to have existed,

[83] People ex rel. Judson *v.* Thacher, 55 N. Y. 525.

Where a duly elected officer has in fact, disqualified himself, as shown by his own petition, the court will not on his petition, oust a third person who may be in possession of the office without authority. Holbrock *v.* Egry, 79 Oh. St. 391, 87 N. E. Rep. 269.

Where the plaintiff was a police judge and the legislature had created another office of city court judge which was held by the defendant, and the only way in which such city court judge had "intruded upon" or "usurped" the plaintiff's office was by hearing and determining causes brought before him which would otherwise have been brought before the plaintiff, such plaintiff cannot by *quo warranto* in his own name, test the constitutionality of the law creating the office of city court judge under which the defendant holds office. Baughman *v.* Nation, 76 Kan. 668, 92 Pac. Rep. 548.

[84] Ang. & A. on C., § 756; People *v.* Utica Ins. Co., 15 Johns. 358, High on Ex. R., § 652.

Quo warranto to test the corporate existence of a municipality can be brought only in the name of the state and not in the name of private persons. State *v.* Shufford, 77 Kan. 263, 94 Pac. Rep. 137.

A proceeding to oust a corporation of its charter and franchise for violation of statutes is a civil proceeding, even though the corporation and its officers are liable criminally for such violations of law. Hence *quo warranto* is a proper remedy. And the fact that such officers may be amenable to the criminal law is not a bar. State *v.* Standard Oil Co., 218 Mo. 1, 116 S. W. Rep. 902.

A private citizen cannot institute *quo warranto* proceedings to test the legality of the proceedings had for the purpose of creating and organizing municipal subdivisions of the state. The law officer of the state, the attorney general, alone has that right. State *v.* Olson, 107 Minn. 136, 119 N. W. Rep. 799, 21 L. R. A. N. S. 685.

The state's attorney cannot "loan" or "farm out" his power to institute *quo warranto*, and where such proceedings are instituted without his signature or active consent, his mere passive acqui-

its continuance is presumed, until the contrary is shown.[85] An official certificate, sanctioning the construction of defendants' works, and allowing them to exercise their franchise, is not conclusive against the people.[86] Where it is discretionary with the court to declare a forfeiture or not, there should be some evidence of existing danger or inconvenience to the community, requiring it.[87] Where the action depends on the breach of a condition subsequent, a failure to comply with it literally, is not enough.[88] A substantial performance will prevent forfeiture.[89]

escence will not validate the proceedings. State *v.* Taylor, 208 Mo. 442.

[85] Ang. & A. on C., § 757; People *v.* Manhattan Co., 9 Wend. 351, 378.

When a complaint brings a supposed corporation into court by its corporate name, its existence is thereby admitted; and when it is thus admitted that it once existed but it is claimed that it has ceased to exist, the complaint should state facts showing how and by what means it ceased to exist. People *v.* Stanford, 77 Cal. 360, 18 Pac. Rep. 85, 19 Pac. Rep. 693, 2 L. R. A. N. 92.

The legal corporate existence of a drainage district cannot be questioned collaterally but may be directly attacked in *quo warranto*. Brown *v.* Wilson, 216 Mo. 215, 115 S. W. Rep. 549.

[86] People *v.* Fishkill & Beekman Plankroad Co., 27 Barb. 445.

In proceedings in the nature of *quo warranto* instituted by a private citizen as relator to test the validity of proceedings had for organizing a municipal corporation, the fact that the relator is under indictment by the grand jury of the alleged defectively organized county does not vest in him any distinct or special right within the meaning of the law. His situation is different; but his interest in the question whether the county was legally organized is identical with that of other citizens, varying only in degree. He occupies no better position than a general taxpayer or a legal voter who pays no taxes. State *v.* Olson, 107 Minn. 136, 119 N. W. Rep. 799, 21 L. R. A. N. S. 685.

[87] Ang. & A. on C., § 775; State *v.* Essex Bank, 8 Vt. 489.

[88] Thompson *v.* People, 23 Wend. 537, 586, rev'g 21 Id. 235; People *v.* Williamsburgh Turnpike Co., 47 N. Y. 586, 592.

[89] Id.

CHAPTER LIV

ACTIONS FOR INFRINGEMENT OF TRADE-MARKS

1. Plaintiff's title.
2. Resemblance of defendant's mark.
3. Intent.
4. Damages.
5. Witnesses.
6. *Defenses.*

1. Plaintiff's Title.

Title may be shown by evidence of invention or composition (by plaintiff or his servants,[90] or grantors) [91] and an appropriation and adoption [92] in a general use antedating

[90] Caswell *v.* Davis, 58 N. Y. 223. Every person has the right to use his name in the prosecution of his business except where such name has become the trade mark or business sign of another and the use of such name would result in deceiving the public and defrauding the person who first made it valuable. Caswell *v.* Hazard, 121 N. Y. 484, 493, 24 N. E. Rep. 707, 18 Am. St. Rep. 833.

[91] Cong. & Emp. Spring Co. *v.* High Rock Cong. Spring Co., 10 Abb. Pr. N. S. 348, s. c., 45 N. Y. 291, rev'g 57 Barb. 526; Fulton *v.* Sellers, 4 Brewst. (Penn.) 72. Continued use for about ten years of the words "Excelsior Felt Pads." To designate the felt pads manufactured by the plaintiff, gives the manufacturers a valid trade mark both in the name and the label, and other manufacturers, who label their pads "excellent felt pads," will be enjoined from using such similar name. Volger *v.* Force, 63 App. Div. 122, 71 N. Y. Supp. 209.

[92] As to how far proof of association of the plaintiff's article, and his only, with the word adopted by him, will serve to show origin and ownership, see Smith *v.* Reynolds, 10 Blatchf. 100; Morrison *v.* Case, 9 Id. 548; Meriden Britannia Co. *v.* Parker, 39 Conn. 450; Canal Co. *v.* Clark, 13 Wall. 311, same cases, Codd. Dig. L. of Tradem., §§ 261, 694, 716, 759, 1010. Grocers Journal Co. *v.* Midland Pub. Co., 127 Mo. App. 356, 105 S. W. Rep. 310. Where it appeared that the defendants had used the trade name before the plaintiff appropriated it as a trade mark, and continued so to use it up to the time the action was commenced, they could not be charged with infringement. Kahn *v.* Gaines, 161 Fed. Rep. 495, 88 C. C. A. 437. "A manufacturer or merchant

defendant's use. The fact that an article was known in a trade in a certain way, is one to which qualified witnesses may testify directly;[93] and even negative evidence from such witnesses is competent.[94] In an action in a State court, registration under the act of Congress[95] is not a ground of right or relief.[96] In an action in the United States courts, a certification of registration is not conclusive evidence that the mark is a proper trade-mark, or that plaintiff has prior right.[97] Unsustained claim of copyright is not relevant.[98]

may secure the right to be protected in the exclusive use of as many separate trade marks as he adopts and so uses that they become to purchasers and those who intend to purchase, distinguishing marks of the goods he makes or sells." Layton Pure Food Co. *v.* Church, etc., Co., 182 Fed. Rep. 24, 104 C. C. A. 464.

[93] Pollen *v.* Le Roy, 30 N. Y. 549. But "one cannot sustain claims to numerous trade names for a single article when these claims tend to produce confusion in the trade and fail to denote origin, or fail to distinguish the goods he manufactures from those made or sold by others." Layton Pure Food Co. *v.* Church, etc., Co., 182 Fed. Rep. 24, 104 C. C. A. 464.

[94] Wilkinson *v.* Greely, 1 Curt. C. Ct. 439. For a trade mark in a fanciful designation, see Dr. Dadirrian, etc., Sons *v.* Hauenstein, 37 Misc. 23, 74 N. Y. Supp. 709. See also Columbia Mill Co. *v.* Alcon, 150 U. S. 460, 14 S. Ct. 151, 37 L. ed. 1144, for a discussion of the devices, marks and symbols which are subject to trade mark.

[95] U. S. Comp. Stat., § 9485.

[96] Popham *v.* Wilcox, 14 Abb. Pr. N. S. 206; Oakes *v.* St. Louis Candy Co., 146 Mo. 391, 48 S. W. Rep. 467. Though it may be a relevant fact on the question of adoption and priority of claim. "The right to the exclusive use of a trade mark is not gained or lost by claim or by registration. It is acquired by adoption and by a use so persistent and continuous that it comes to distinguish in the eyes and thought of purchasers and of those who seek to purchase, the goods of its owner from those of other makers and sellers. When it has been thus acquired it may be lost by a failure to continue its use, by conveyance or by renunciation. It is not dependent upon the national statute which authorizes a registration of trade marks. It is a right secured under and protected by the common law." Layton Pure Food Co. *v.* Church, etc., Dwight Co., 182 Fed. Rep. 24, 104 C. C. A. 464.

[97] Moorman *v.* Hoge, 2 Sawyer, 78; Thomas G. Carroll, etc., Co. *v.* McIlvaine & Baldwin, 171 Fed.

[98] Wolfe *v.* Barnett, 24 La. Ann. 97, s. c., 13 Am. Rep. 111.

2. Resemblance of Defendant's Mark.

It is not necessary to prove the use of a mark in all respects like the original. It is sufficient if the resemblance is such as to show an intention to deceive,[99] or a degree of imitation so resembling the mark of the plaintiff, as that ordinary purchasers, buying with ordinary caution, are likely to be misled.[1] Variations that a comparison with the original would instantly disclose, do not protect defendant, if it appears that the ordinary mass of purchasers, paying that attention which such persons usually do in buying the article, would probably be deceived.[2] Evidence

Rep. 125. But the grant of a registered trade mark to the complainant makes him the *prima facie* owner thereof. Deitsch *v.* George R. Gibson Co., 155 Fed. Rep. 383.

[99] Wotherspoon *v.* Currie, L. R. 5 H. of L. 508, s. c., 3 Moak's Eng. 29; Andrew Jurgens Co. *v.* Woodbury, 56 Misc. 404, 106 N. Y. Supp. 571; Coca-Cola Co. *v.* Nashville Syrup Co., 200 Fed. Rep. 157; Eagle White Lead Co. *v.* Pflugh, 180 Fed. Rep. 579.

[1] McLean *v.* Fleming, 96 U. S. (6 Otto) 245, 251; Boker *v.* Korkemas, 122 App. Div. 96, 106 N. Y. Supp. 904; Gaines *v.* Kahn, 155 Fed. Rep. 639. The court must determine from the appearance of the article whether the public is likely to be deceived. Moebius *v.* Dejone, 215 Fed. Rep. 443. "The introduction of two packages having the same trade name and apparently manufactured by different individuals, is absolutely of no relevancy whatever unaccompanied by proof of the circumstances surrounding the origin and use of the respective packages." American Tobacco Co. *v.* Polacsek, 170 Fed. Rep. 117.

[2] Meriden Britannia Co. *v.* Parker, 39 Conn. 450; Partridge *v.* Nenck, 1 How. App. Cas. 548, affi'g 2 Sandf. Ch. 622, 2 Barb. Ch. 101; Davis *v.* Kendall, 2 R. I. 566; Fetridge *v.* Wells, 4 Abb. Pr. 144, s. c., 13 How. Pr. 385; Braham *v.* Bustard, 9 L. T. R. N. S. 199, s. c., 1 H. & M. 447, 11 W. R. 1061, 2 New. 572; Swift *v.* Dey, 4 Robt. 611; Seixo *v.* Provezende, L. R. 1 Ch. 192, s. c., 12 Jur. N. S. 215, 14 W. R. 357, 14 L. T. R. N. S. 314; Gillott *v.* Esterbrook, 48 N. Y. 374, affi'g 47 Barb. 455; Blackwell *v.* Crabb, 36 L. J. Ch. N. S. 504; Rowley *v.* Houghton, 2 Brews. 303, s. c., 7 Phil. 39; Filley *v.* Fassett, 44 Mo. 168; McCartney *v.* Garnhart, 45 Id. 593; Hostetter *v.* Vowinkle, 1 Dill. 329; Blackwell *v.* Armistead, 5 Am. L. T. 85; Burke *v.* Cassin, 45 Cal. 467; Bradley *v.* Norton, 33 Conn. 157; Amoskeag Mfg. Co. *v.* Garner, 4 Am. L. T. N. S. 176; Leather Cloth Co., &c. *v.* American Leather Cloth Co., &c., 11 Ho. of L.

that any one has been actually deceived, or has bought goods with the defendant's mark, under the belief that they were manufactured by the plaintiff, is not necessary, provided the resemblance is such as would be likely [3] to cause the one mark to be mistaken for the other.[4] Probability of deception is generally shown by resemblance and by the opinions of experts. Resemblance as shown by inspection is, however, the primary test and criterion, and proof by experts is seldom resorted to.

3. Intent.

Evidence that defendant intentionally either uses or closely imitates plaintiff's trade-mark, raises a legal, but not conclusive, presumption of a fraudulent purpose of deceiving the public; and in such case, even at law, nominal damages will be given, though no specific injury be proved.[5]

Cas. 523, 35 L. J. Ch. N. S. 53, 13 W. R. 873, 12 L. T. R. N. S. 742, 6 New. 209, 11 Jur. N. S. 81; Bass *v.* Dawber, 19 L. T. R. N. S. 626; same cases, Codd. Dig. L. of Tradem., §§ 289, 339–401; McDonald, etc., Mfg. Co. *v.* H. Mueller Mfg. Co., 183 Fed. Rep. 972, 106 C. C. A. 312. That careful buyers may not have been deceived is no defense. Howard Dustless Duster Co. *v.* Carleton, 219 Fed. Rep. 913.

[3] In many of the cases even the *possibility* of misleading the public is held sufficient. See Amoskeag Mfg. Co. *v.* Garner, 4 Am. L. T. N. S. 176; Cope *v.* Evans, L. R. 18 Eq. 138, s. c., 30 L. T. R. N. S. 292, 22 W. R. 453; Meriden Britannia Co. *v.* Parker (above); American Lead Pencil Co. *v.* Gottlieb, 181 Fed. Rep. 178.

[4] Abbott *v.* Bakers, &c. Ass'n, 1872, Weekly Notes, 31; Braham *v.* Bustard (above); Partridge *v.* Menck (above); Shrimpton *v.* Laight, 18 Beav. 164; Filley *v.* Fassett (above); same cases, Codd. Dig. L. of Tradem., §§ 286, 349, 360, 377, 389; but see also §§ 288, 296, 327, 352, 361, 395. Evidence of the eyes as to whether confusion is likely is more persuasive and satisfactory than any other. Layton Pure Food Co. *v.* Church, etc., Co., 182 Fed. Rep. 24, 104 C. C. A. 464.

[5] Browne on Tradem., § 501. Otherwise of an ignorant violation. Weed *v.* Peterson, 12 Abb. Pr. N. S. 178. On the other hand, malicious use of same name, if it be not a trade-mark, is not actionable. See Glendon Iron Co. *v.* Uhler, 75 Penn. St. 467. Wrongful intent may be presumed from the fact of infringement. Gorham Mfg. Co. *v.* Schmidt, 196 Fed. Rep. 955.

To obtain an injunction, fraud need not be proved. An infringement inadvertently commenced may be enjoined.[6] Intent is generally immaterial in equity cases, except upon the question of damages.[7] Presumption of fraudulent intent, arising from resemblance, is very strong where it is shown that the defendant himself places the mark upon the articles; but in suits against a dealer who buys and sells them with the marks already affixed, knowledge must be clearly proved to make him liable to account.

4. Damages.

In an action for an injunction, it is not necessary to prove damage, if the evidence satisfies the court that the thing done has a tendency to enable defendants to deceive by selling, as and for the plaintiff's, their own goods.[8] In an action for damages, evidence of actual damage is not necessary in order to entitle plaintiff to recover nominal damages.[9] Evidence that plaintiff's sales fell off is received.[10] In equity, the proof of damages should be directed to

[6] Singer Mfg. Co. *v.* Wilson, 26 Weekly R. 664, 667; McLean *v.* Fleming, 96 U. S. (6 Otto) 245. Actual fraud or wrongful intent need not be shown. Gulden *v.* Chance, 182 Fed. Rep. 303, 105 C. C. A. 16; Stephano *v.* Satmatopoulos, 199 Fed. Rep. 451.

[7] Millington *v.* Fox, 3 Mylne & Cr. 338; Coats *v.* Holbrook, 2 Sandf. Ch. 586, s. c. *sub nom.* Coats *v.* Shepard, 3 N. Y. Leg. Obs. 404; Taylor *v.* Carpenter, 11 Paige, 292, s. c., 2 Sandf. Ch. 603; Coffeen *v.* Bronton, 4 McLean, 516; Amoskeag Mfg. Co. *v.* Spear, 2 Sandf. Ch. 599; and other cases in Codd. Dig. L. of Tradem., §§ 450–84.

[8] Braham *v.* Beachim, 26 Weekly R. 654, 656. Proof of actual injury is not required to maintain an action for injunction. Eagle White Lead Co. *v.* Pflugh, 180 Fed. Rep. 579.

[9] Blofield *v.* Payne, 1 N. & M. 353, s. c., 4 B. & A. 410, 3 L. J. N. S. 68; Reeves *v.* Denicke, 12 Abb. Pr. N. S. 92; Singer Mfg. Co. *v.* Kimball, 10 Scottish L. R. 173, s. c., 45 Scottish Jurist, 201; Thompson *v.* Winchester, 19 Pick. 214; Rodgers *v.* Nowill, 11 Jurist, 1037, s. c., 5 C. B. 109, 17 L. J. N. S. C. P. 52, s. c., Codd. Dig. L. of Tradem., §§ 235, 432, 435, 928, 929. Loss may be presumed. Wolf *v.* Hamilton-Brown Shoe Co., 206 Fed. Rep. 611, 124 C. C. A. 409.

[10] Hostetter *v.* Vowinkle, 1 Dill. C. Ct. 329. The plaintiff may give evidence of the falling off

ascertaining the profits which the plaintiff would have realized, if he had sold of his own goods the same quantity which the defendant sold with the spurious marks thereon.[11] It is immaterial what the defendant made or lost.[12] Vindictive damages are not allowed,[13] nor the expense of procuring an injunction.[14] The relative quality of the plaintiff's and the defendant's goods is immaterial.[15]

5. Witnesses.

A party claiming a trade-mark may be compelled to

of his custom concurrently with defendant's beginning to use the trade-mark; the inference that the falling off of custom was due to the defendant's use of the trade-mark is for the jury. Shaw *v.* Pilling, 175 Pa. St. 78, 34 Atl. Rep. 446.

[11] Hostetter *v.* Vowinkle (above); Barnett *v.* Phalon, 11 Abb. Pr. 157, s. c., 19 How. Pr. 530; Faber *v.* Hovey, Codd. Dig. L. of Tradem., § 249. And see Marsh *v.* Billings, 7 Cush. 322; Leather Cloth Co. &c. *v.* Hirschfield, 13 L. T. R. N. S. 427, s. c., L. R. 1 Eq. 299; same cases, Codd. Dig. L. of Tradem., §§ 239, 244, 247.

"The question of the true measure of damages in cases of this sort is an interesting one. The injured party is entitled to full compensation for the injury, but how shall that be measured? Manifestly, the profits which the infringer has made would not in all cases be compensation to the injured. The latter's loss in part inheres in the failure to acquire a just and deserved gain; also in the injury to the reputation of his product by reason of the substitution of the spurious article. The latter element is difficult, if not impossible of accurate admeasurement. It can only be approximately compensated by an allowance in the nature of punitory damages, resting largely in discretion." Per Jenkins, J., in Baker *v.* Slack, 130 Fed. Rep. 514, 65 C. C. A. 138. But see Hennessy *v.* Wilmerding-Loewe Co., 103 Fed. Rep. 90.

[12] Davidson *v.* Munsey, 29 Utah, 181, 80 Pac. Rep. 743; Peltz *v.* Eichele, 62 Mo. 171; but see Howe *v.* McKernan, 30 Beav. 547. The above rules seem to govern the proper mode of assessing the damages; although, in some of the cases, the profit realized by the defendant from the sales of the spurious articles under the simulated trademark, has been held to be the measure. Taylor *v.* Carpenter, 2 Woodb. & M. 1; Edelsten *v.* Edelsten, 10 L. T. R. N. S. 780; Graham *v.* Plate, 40 Cal. 593.

[13] Taylor *v.* Carpenter, 2 Woodb. & M. 1.

[14] Burnett *v.* Phalon, 12 Abb. Pr. 186, s. c., 21 How. Pr. 100.

[15] Blofield *v.* Payne (above); Taylor *v.* Carpenter (above).

testify as to the process of his manufacture, so far as relevant;[16] and the alleged infringer may be compelled to testify,[17] and to produce his books, shown to have a tendency to prove the infringement,[18] subject to his privilege against being required to criminate himself[19] in reference to a criminal offense not statute barred.[20] Defendant may be compelled to disclose the names of all persons to whom he has sold the goods.[21]

6. Defenses.

Neither alienage of the person whose trade-marks are simulated, nor the fact that he resides in a foreign country, nor the fact that the goods were manufactured or the mark affixed abroad, constitute a defense.[22] It is wholly imma-

[16] Byrne *v.* Judd, 11 Abb. Pr. N. S. 390; Burnett *v.* Phalon, 11 Abb. Pr. 157, s. c., 19 How. Pr. 530; Burnett *v.* Phalon, 12 Abb. Pr. 186, s. c., 21 How. Pr. 100. In a suit to enjoin the use of a trade mark, the defendant cannot, however, compel the plaintiff to disclose the ingredients employed in the manufacture of plaintiff's article on the theory that such article contained injurious qualities. Tetlow *v.* Savournin, 15 Phila. (Pa.) 170. Approved in Moxie Nerve Food Co. *v.* Beach, 35 Fed. Rep. 465.

[17] Byass *v.* Sullivan, 21 How. Pr. 50; s. p., Byass *v.* Smith, 4 Bosw. 679. As to testimony of a witness in this connection, see Herreshoff *v.* Knietsch, 127 Fed. Rep. 492.

[18] Byass *v.* Sullivan (above).

[19] Chapter XXXIV, paragraph 12 of this vol.; Byass *v.* Sullivan (above); s. p., Byass *v.* Smith (above).

[20] Wolf *v.* Goulard, 15 Abb. Pr. 336.

[21] Howe *v.* M'Kernan, 30 Beav. 547; Orr *v.* Diaper, 46 L. J. Ch. N. S. 41; and see Carver *v.* Pinto Leite, 20 W. R. 134, s. c., 41 L. J. Ch. N. S. 92, L. P., 7 Ch. 90, 20 L. T. R. N. S. 722, s. c., Codd. Dig. L. of Tradem., §§ 270, 271, 272, 274.

[22] Taylor *v.* Carpenter, 3 Story, 458; Taylor *v.* Carpenter, 2 Sandf. Ch. 603, affi'g 11 Paige, 292; Taylor *v.* Carpenter, 2 Woodb. & M. 1; Collins Co. *v.* Brown, 3 Kay & J. 423, s. c., 3 Jurist N. S. 929; Collins Co. *v.* Cowen, 3 Kay & J. 428, s. c., 3 Jurist, 929; Collins Co. *v.* Reeves, 28 L. J. Ch. 56; same cases, Codd. Dig. L. of Tradem., §§ 111–15, 458. On the other hand it has been held that nonresident aliens are not entitled to an injunction against a citizen for the infringement of a trade mark. De Nobili *v.* Scanda, 198 Fed. Rep. 341.

terial, whether the simulated article is or is not of equal goodness or value with the genuine article.[23] The want of intent to deceive or defraud is not a defense,[24] nor is it any answer that the maker of the spurious goods, or the jobber who sells them to the retailers, informs those who purchase that the article is spurious or an imitation.[25] The weight of authority is that acquiescence by the plaintiff, in an infringement of his mark, is no more than a revocable license, and that, to constitute a defense, the evidence must be strong enough to show either an abandonment or a dedication to the public. Knowledge of the piratical use of the mark must, in all cases, be brought home to the owner, where this defense is taken.[26] Proof of a custom abroad to

[23] Blofield *v.* Payne, 1 N. & M. 353, s. c., 4 B. & A. 410, 3 L. J. N. S. 68; Taylor *v.* Carpenter, 11 Paige, 292, s. c., 2 Sandf. Ch. 603.

[24] See the cases cited under *Intent* (above). Good faith is not a defense. Howard Dustless Duster Co. *v.* Carleton, 219 Fed. Rep. 913.

[25] Chappell *v.* Davidson, 2 Kay & J. 123, s. c., 8 De G., M. & G. 1; Edelsten *v.* Edelsten, 9 Jurist N. S. 479, s. c., 1 De G. J. & S. 185, 11 W. R. 328, 1 New. 300, 7 L. T. R. N. S. 768; Shrimpton *v.* Laight (above); Clark *v.* Clark, 25 Barb. 76; Sykes *v.* Sykes, 3 B. & C. 541, s. c., 5 Dowl. & R. 292; s. c., Codd. Dig. L. of Tradem., §§ 255, 256, 280, 349, 356, 360. "If a manufacturer or wholesale dealer wilfully puts up goods in such a way that the ultimate purchaser will be deceived into buying the goods of another it is no defense that he does not deceive and has no intention of deceiving the retailer, to whom he himself sells the goods. The question is whether the defendants have or have not knowingly put into the hands of the retail dealers the means of deceiving the ultimate purchaser." Wolf *v.* Hamilton Brown Shoe Co., 206 Fed. Rep. 611, 124 C. C. A. 409.

[26] This defense is discussed in the following cases: Motley *v.* Downman, 3 Myl. & Cr. 1, s. c., 6 L. J. Ch. N. S. 308; Taylor *v.* Carpenter, 3 Story, 458; Taylor *v.* Carpenter, 22 Woodb. & M. 1; Flavell *v.* Harrison, 10 Hare, 467, s. c., 19 Eng. L. & Eq. 15, 17 Jurist, 368; McCardel *v.* Peck, 28 How. Pr. 120; Gillott *v.* Esterbrook, 47 Barb. 455, affi'd in 48 N. Y. 374; Filley *v.* Fassett, 44 Mo. 168; Amoskeag Mfg. Co. *v.* Garner, 55 Barb. 151, s. c., 6 Abb. Pr. N. S. 265; but see s. c., 4 Am. Law T. N. S. 176; Delaware and Hudson Canal Co. *v.* Clark, 7 Blatchf. 112; Hovenden *v.* Lloyd, 18 W. R. 1132; Isaacson *v.* Thompson, 20 W. R. 196; Rodgers *v.* Rodgers, 31 L. T. R. N. S. 285, s. c., 22 W. R. 887;

violate plaintiff's trade-mark is not alone admissible for defendant.[27] The fact that plaintiff's hands are not clean, and his trade-mark is used to deceive or impose upon the public, or is used upon a spurious, worthless or deleterious compound, is competent, although the defendants' conduct be also fraudulent and their goods spurious, and although they deceive the public.[28]

Browne *v.* Freeman, 12 W. R. 305, s. c., 4 New. 476; same cases, Codd. Dig. L. of Tradem., §§ 55–76. Complainant's delay in prosecuting an infringer, before he has notice of the facts, does not constitute such laches as will preclude him from maintaining the action. Layton Pure Food Co. *v.* Church, etc., Co., 182 Fed. Rep. 24, 104 C. C. A. 464. Where the defendant acts in good faith and the complainant, having knowledge of the infringement, delays in bringing suit, laches may be a defense to the prayer for an accounting, although an injunction may be granted. Worcester Brewing Corp. *v.* Reter, 157 Fed. Rep. 217, 84 C. C. A. 665. See also, Havana Commercial Co. *v.* Nichols, 155 Fed. Rep. 302.

[27] Taylor *v.* Carpenter, 2 Woodb. & M. 1. Abandonment of the trade mark by the complainant or his assignor is a defense. Eiseman *v.* Schiffer, 157 Fed. Rep. 473.

[28] Pidding *v.* How, 8 Sim. 477; and see Codd. Dig. L. of Tradem., §§ 530–43. Castroville Co-op. Creamery Co. *v.* Col, 6 Cal. App. 533, 92 Pac. Rep. 648. Plaintiff manufactured and sold a preparation under the name of "Syrup of Figs," when as a matter of fact its principal constituent was syrup of senna. It was held that the plaintiff was not entitled to protection against the infringement of his trade name, even though the misrepresentation might be harmless. Worden *v.* California Fig Syrup Co., 187 U. S. 516, 23 S. Ct. 161, 47 L. ed. 282. Where the plaintiff falsely represented that the drink which it manufactured and sold was made from a plant grown in South America, relief was denied. Moxie Nerve Food Co. *v.* Modox Co., 152 Fed. Rep. 493. Relief was denied when the complainant falsely represented to the public that the remedy which it sold contained gold. Memphis Keeley Inst. *v.* Leslie E. Keeley Co., 155 Fed. Rep. 964, 84 C. C. A. 112, 16 L. R. A. N. S. 921. An injunction was denied because the complainant represented that whiskey which he was selling was "pure Old Pepper Whiskey," when as a matter of fact it was actually mixed with other grades. Krauss *v.* Jos. R. Peebles' Sons Co., 58 Fed. Rep. 585.

CHAPTER LV

ACTIONS FOR INFRINGEMENTS OF PATENTS AND COPYRIGHTS

I. PATENTS.

1. Burden of proof: General evidence of validity.
2. Novelty of invention.
3. Utility.
4. Patentee the original and first inventor.
5. Specifications: Construction: Extent of claim.
6. Title.
7. Extension: Renewal: Reissue.
8. State of the art.
9. Infringement.
10. Witnesses: Models.
11. Admissions and declarations.
12. Certified copies.
13. Damages.
14. *Defenses.* General issue: Burden of proof.

I. PATENTS—*continued.*

15. — title: license.
16. — defendant's patent.
17. — the statute.
18. — fraud.
19. — description in printed publication.
20. — prior knowledge or use.
21. — public use or sale before application: abandonment.
22. — requisites of the statutory notice or answer.
23. — plaintiff's failure to mark.

II. COPYRIGHTS.

24. Plaintiff's rights.
25. Infringements.

I. PATENTS

1. Burden of Proof: General Evidence of Validity.[29]

The burden is on plaintiff to prove that he, or the patentee under whom he claims, was the original inventor, within the statute; [30] but the production of the patent,[31] if in due form,

[29] Even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue. Doolan *v.* Carr, 125 U. S. 618, 625.

The temporary pledge of a patent does not prevent the patentee from maintaining a suit for infringement. Westmorland Specialty Co. *v.* Hogan, 167 Fed. Rep. 327, 93 C. C. A. 31.

[30] Plaintiff cannot abandon at the trial a part of a combination claimed in the pleading, and rely

[31] Including the specification and drawings. Cahoon *v.* Ring, 1 Fish. Pat. Cas. 397, 403, CLIFFORD, J. And whether the patent be

affords *prima facie* evidence of its correctness, which, in the absence of opposing proof, is sufficient.[32] A renewal or reissue adds to the presumption of validity.[33] As will be

on the other parts. Vance *v.* Campbell, 1 Black. 427, 429. The burden of proof is upon the party who is the last to file his application in the Patent Office and this status of the parties is not changed by the fact that the junior application may have obtained a patent. Hunt *v.* McCaslin, 10 Tucker's App. D. C. 527. In an interference proceeding between a patentee and an applicant for patent the patentee is entitled to no advantage of position in the controversy where the applicant's application was filed prior to that of his rival, and had not been abandoned; and the burden of proof in such case is on the patentee. Wurts *v.* Harrington, 10 Tucker's App. D. C. 149. In such a case the tribunals of the patent office should be guided by the ordinary rules of courts of law in respect of the burden of proof. Id.

An inventor's claim should be construed as broadly as his invention, and he who uses the invention without license should be held to infringe, no matter what else he may use. Hall Signal Co. *v.* Gen. Ry. Signal Co., 169 Fed. Rep. 290, 94 C. C. A. 580.

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original or reissued. Sewell *v.* Collins, 1 Fish. Pat. Cas. 289, 291. And though not containing any recitals. Gear *v.* Grosvenor, 6 Id. 314.

"The presumption of invention arising from the grant of a patent, whatever its weight, continues until evidence sufficient to overcome it is introduced. National Malleable Castings Co. *v.* Am. Steel Foundaries, 182 Fed. Rep. 626.

[32] Philadelphia, &c. R. R. Co. *v.* Stimpson, 14 Pet. 458; Mitchell *v.* Tilghman, 19 Wall. 287. If plaintiff rests on this presumption, in support of a matter on which the patent is not impeached, he cannot in rebuttal give other evidence in support of the same. But evidence on another ground, in respect to which the patent has been impeached, is not to be excluded merely because it bears indirectly on the former ground. Judson *v.* Cope, 1 Fish. Pat. Cas. 615, 619, 620.

Where fraud and criminal acts in the procurement of a patent are charged, the defenses must be established by clear, unequivocal and convincing proof. Eastern Paper Bag Co. *v.* Continental Paper Bag Co., 142 Fed. Rep. 479, affi'd Continental Paper Bag Co. *v.* Eastern Paper Bag Co., 150 Fed. Rep. 741, 80 C. C. A. 407, affirmed 210 U. S. 405, 28 S. Ct. 748, 52 L. ed. 1122. See also Lalone *v.* United States, 164 U. S. 255, 17 S. Ct. 74, 41 L. ed. 425.

[33] Ransom *v.* The Mayor, &c. of New York, 1 Fish. Pat. Cas. 252, 259.

seen below, this presumption is not conclusive in respect to any question depending on the patentable character of the device, or the right of the patentee as inventor.[34] Accepting and acting under a license from the patentee estops from questioning the validity of the patent as against him.[35] The patentee's disclaimer, in his description, of what is found in another patent, is an admission of the validity of the latter.[36]

2. Novelty of Invention.

The patent is itself sufficient *prima facie* evidence of novelty,[37] but is not conclusive.[38] Extension, without modification, enhances the presumption of novelty.[39] Negative evidence by calling witnesses who might have known of the thing, had it pre-existed, is competent; [40] so is the testimony

[34] Union Sugar Refinery *v.* Matthiessen, 2 Fish. Pat. Cas. 600, 607. How far it is conclusive in respect to the formalities required by the law has been the subject of some difference of opinion, and is not perhaps fully settled, unless it may be in reference to reissues. "It has come to be regarded as the better opinion," says CLIFFORD, J., "that all matters of fact involved in the hearing of an application to reissue a patent, and in granting it, are conclusively settled by the decision of the commissioner granting the application." Seymour *v.* Osborne, 11 Wall. 516, 545; and see paragraph 7 of this chapter.

[35] Kinsman *v.* Parkhurst, 18 How. (U. S.) 289, affi'g 1 Blatchf. 488.

[36] Waterbury Brass Co. *v.* N. Y. & Brooklyn Brass Co., 3 Fish. Pat. Cas. 43, 48.

[37] Clark *v.* George Lawrence Co., 160 Fed. Rep. 512; Corning *v.* Burden, 15 How. (U. S.) 252, 270. So, also, of the novelty of a combination (Waterbury Brass Co. *v.* N. Y. & Brooklyn Brass Co., 3 Fish. Pat. Cas. 43, 48); and that the device required invention. Potter *v.* Holland, 1 Fish. Pat. Cas. 382, 387.

[38] Reckendorfer *v.* Faber, 92 U. S. (2 Otto) 347.

[39] Whitney *v.* Mowry, 3 Fish. Pat. Cas. 157, 162. In such case evidence of want of novelty must be strong and conclusive. Id. 161; Cook *v.* Ernest, 5 Fish. Pat. Cas. 396.

Novelty may consist in transferring a device from one branch of industry to another so that it may be put to a new use. H. J. Heinz Co. *v.* Cohn, 207 Fed. Rep. 547, 125 C. C. A. 197.

[40] Curt. on Pat. 625, § 473.

of experts; [41] and in case of serious doubt, proof of the actual performance of the thing itself is competent to go to the jury on the question of novelty.[42] Parol evidence is not admissible to show at what time the patent was applied for.[43]

3. Utility.

The patent is sufficient *prima facie* evidence of utility,[44] but not conclusive.[45] Utility may be shown by direct testimony of witnesses.[46] Producing old results, substantially better, faster or cheaper, is sufficient evidence of utility.[47] For the purpose of proving utility, it is competent to show defendant's use of the invention; [48] a former license [49] or contract between the plaintiff and the defendant, allowing the latter to use it; the fact that defendant had advertised and sold it as useful;[50] or that plaintiff had carried on a large and long continued manufacture; [51] had received large orders,[52] and had given licenses.[53] The fact that both parties claim the right to manufacture is sufficient evidence of utility.[54]

[41] See, for instance, Rubber-Coated, &c. Co. *v.* Welling, 97 U. S. (7 Otto) 7, 8.

[42] Judson *v.* Cope, 1 Fish. Pat. Cas. 615, 624.

[43] Wayne *v.* Winter, 6 McLean, 344.

[44] Corning *v.* Burden, 15 How. (U. S.) 252, 270; Clark *v.* George Lawrence Co., 160 Fed. Rep. 512.

[45] Reckendorfer *v.* Faber, 92 U. S. (2 Otto) 347.

[46] Waterbury Brass Co. *v.* N. Y. & Brooklyn Brass Co., 3 Fish. Pat. Cas. 43.

But where the patent was granted without a proper consideration of other existing patents, the presumption of validity is weakened. Westinghouse Electric etc., Co. *v.* Toledo, etc., R. R. Co., 172 Fed. Rep. 371, 97 C. C. A. 69; American Soda Fountain Co. *v.* Sample, 130 Fed. Rep. 145, 64 C. C. A. 497.

[47] Murray *v.* Clayton, L. R. 7 Ch. App. 570, s. c., 3 Moak's Eng. 515; Wilbur *v.* Beecher, 2Blatchf. 132.

[48] Simpson *v.* Mad River R. R. Co., 6 McLean, 603.

[49] Lee *v.* Blandy, 1 Bond, 361, s. c., 2 Fish. Pat. Cas. 89.

[50] Stanley *v.* Whipple, 2 McLean, 35, 39.

[51] Whitney *v.* Mowry, 3 Fish. Pat. Cas. 157, 162.

[52] Curt. on Pat. 629, § 477.

[53] Id.

[54] Middletown Tool Co. *v.* Judd, 3 Fish. Pat. Cas. 141, 144.

4. Patentee the Original and First Inventor.

The patent is sufficient *prima facie* evidence that the patentee was the original and first inventor,[55] but is not conclusive.[56] This presumption, in the absence of the application for the patent, extends back only to the date of the patent.[57] If the application is produced, the presumption extends back to the time when the application was filed, and no further.[58] To show that the invention was prior to the filing of his original application, he must prove, by competent and sufficient evidence, both that he made the invention at the time suggested, and that he reduced it to practice as an operative machine.[59] The plaintiff may prove his own conversations and declarations made during the progress of his invention, to show its date and character, these being regarded as part of the *res gestæ* of the process, and an assertion of claim, which he may prove in his own favor.[60]

[55] Seymour *v.* Osborne, 11 Wall. 516, 538; Smith *v.* Goodyear Dental Vulcanite Company, 93 U. S. (3 Otto) 486. As between two parties to a patent interference proceeding, one of whom has a patent while the other is an applicant, the burden of proof is on the applicant to show that he is the true original and first inventor. La Flare *v.* Chase, 8 Tucker's App. D. C. 83. But while the burden is on the junior applicant, it is not so onerous as to require him to show it beyond a reasonable doubt. Wurts *v.* Harrington, 10 Tucker's App. D. C. 149.

[56] Union Sugar Refinery *v.* Matthiessen, 2 Fish. Pat. Cas. 600, 607.

But it can be overcome only by proof beyond a reasonable doubt, of lack of novelty or prior invention. H. J. Heinz Co. *v.* Cohn, 207 Fed. Rep. 547, 125 C. C. A. 197.

[57] Wing *v.* Richardson, 2 Fish. Pat. Cas. 535, 537.

[58] Id.; White *v.* Allen, 2 Fish. Pat. Cas. 440, 444.

[59] Johnson *v.* Root, 2 Cliff. 116, s. c., 2 Fish. Pat. Cas. 291, 297; Jones *v.* Sewall, 6 Fish. Pat. Cas. 343, 358.

The reduction to practice must be by the applicant himself or by his authorized agent rather than by a third person. Howell *v.* Hess, 30 App. Cas. D. C. 194.

The filing of an allowable application is a constructive reduction to practice. Automatic Weighing Mach. Co. *v.* Pneumatic Scale Corporation, 166 Fed. Rep. 288, 92 C. C. A. 206.

[60] Philadelphia & Trenton R. R.

5. Specifications: Construction: Extent of Claim.

The patent is *prima facie*,[61] if not conclusive, evidence that the specification, when delivered, was accompanied with such drawings and written references thereto as were required by the statute,[62] and that the specification contained a description, in such full, clear and exact terms as will enable any one skilled in the art to which it appertains, to put it in practice from the description contained in the specification.[63] A certified copy of the drawings deposited, and references thereon, is, with the patent, *prima facie* evidence of the particulars of the invention patented.[64] The models and drawings accompanying the application for a patent, and referred to in the specification, constitute a part of it, and may be resorted to to aid the description, and to distinguish the thing patented.[65] Inadequacy of specification cannot be proved unless alleged.[66] The correspondence be-

Co. *v.* Stimpson, 14 Pet. 448, 462. Compare Pennock *v.* Dialogue, 4 Wash. C. Ct. 538; Evans *v.* Hettich, 3 Wash. 408, affi'd in 7 Wheat. 453.

That a patentee believed himself to be the discover of his patented composition will be presumed from his oath to that effect, and the presumption will stand until overthrown by clear evidence. Warren *v.* Owosso, 166 Fed. Rep. 309, 92 C. C. A. 227.

[61] Winans *v.* N. Y. & Erie R. R. Co., 1 Fish. Pat. Cas. 213, 214.

[62] See paragraphs 1 and 7 of this chapter.

[63] Poppenhusen *v.* N. Y. Gutta Percha Co., 2 Id. 62, 67.

[64] Winans *v.* N. Y. & Erie R. R. Co., 1 Id. 213, 214.

The court will not declare immaterial any element specified by a patentee as entering into a combination. Clark *v.* George Lawrence Co., 160 Fed. Rep. 512.

[65] Curtis says that where the invention is at all complicated, or terms of art or science are made use of, requiring the exercise of technical knowledge to determine whether the specification is sufficient, it is at least advisable, if not necessary, for the plaintiff, in opening his case, to give some evidence that his specification can be applied by those to whom the law supposes it to be addressed. Slight evidence of sufficiency is all that is necessary to be offered at first in order to make it incumbent on the defendant to falsify the specification. Curt. on Pat. 630.

[66] Rubber Co. *v.* Goodyear, 9 Wall. 788, 793.

A patentee who while a suit for infringement is pending, applies for

tween the office and the patentee is sometimes referred to for the purposes of construction;[67] but neither such correspondence, nor the proceedings in the patent office, are admissible to enlarge, diminish or vary the language of the claim.[68] The testimony of qualified witnesses,[69] and inspection of the old and new machine, and the models, are competent on the question of sufficiency of the specification. The state of the art is competent evidence in the construction of an ambiguous claim.[70] But evidence introduced for this purpose can have no bearing on a question not in issue.[71] The opinions of scientific witnesses, that a particular means which might be used to carry out the general directions of a specification, would succeed, are competent without showout showing that that means had actually been tried and had succeeded.[72] The question which should be propounded to them, in cases where there is a recognized class of practical workmen who would be called upon to apply the directions of the specifications, is whether a person of that class, of ordinary skill, could practice the invention from those directions.[73]

and obtains a reissue on the ground that the specifications of his patent were inoperative, is thereafter estopped from claiming otherwise. Coffield *v.* Fletcher Mfg. Co., 167 Fed. Rep. 321, 93 C. C. A. 25.

[67] Pike *v.* Potter, 3 Fish. Pat. Cas. 55; Decker *v.* Grote, 6 Id. 143, 150; Pettibone *v.* Derringer, 4 Wash. C. Ct. 215. *Contra*, Westlake *v.* Cartter, 6 Fish. Pat. Cas. 519, 521.

[68] CLIFFORD, J., Goodyear Dental Vulcanite Co. *v.* Gardner, 5 Fish. Pat. Cas. 224, 227.

Where there is doubt as to the proper construction of a claim, it should be given "the evident meaning intended by him who first made it." Viele *v.* Cummings, 30 App. Cas. D. C. 455.

[69] Washburn *v.* Gould, 3 Story C. Ct. 122, 138. As a general rule, the proper witnesses to determine on the sufficiency of a specification are practical workmen of ordinary skill in the particular branch of industry to which the patent relates, because it is to them that the specification is supposed to be addressed. Curt. on Pat. 631.

[70] Rubber-Coated, &c. Co. *v.* Welling, 97 U. S. (7 Otto) 7, 8.

[71] Middletown Tool Co. *v.* Judd, 3 Fish. Pat. Cas. 141, 144.

[72] Curt. on Pat. 642, § 481.

[73] Id. 636, § 481.

6. Title.

A certified copy of an assignment is *prima facie* evidence of the genuineness of the original,[74] without accounting for the original, or proving execution.[75] A patent on its face, issued to an assignee, is sufficient evidence of the assignee's title.

7. Extension: Renewal: Reissue.

Extension,[76] renewal,[77] and reissue,[78] are each *prima facie*

[74] Lee *v.* Blandy, 1 Bond, 361, s. c., 2 Fish. Pat. Cas. 89. "The record of assignment in the Patent Office is a record 'belonging to the Patent Office' within the literal terms of § 892. But, in the absence of that section and for the general purposes of evidence, a paper purporting to be a copy of a record in the Patent Office can be proven to be such copy by the sworn testimony of the person who made it, or of a person who had compared it with the original record in the Patent Office. The view we stated as to the *prima facie* probative force of a copy from the record of an assignment in the Patent Office has been substantially taken in many reported decisions. Standard Elevator Co. *v.* Crane Elevator Co., 46 U. S. App. 411, 472, 76 Fed. Rep. 767. See also Brooks *v.* Jenkins, 3 McLean, 432; Parker *v.* Haworth, 4 McLean, 370; Lee *v.* Blandy, 1 Bond, 361; Dederich *v.* Whitman Agricultural Co., 26 Fed. Rep. 763; National Folding Box and Paper Co. *v.* American Paper Pail & Box Co., 55 Fed. Rep. 488." But see New York *v.* American Cable Railway Company, 26 U. S. App. 7; Paine *v.* Trask, 5 U. S. App. 283.

Proof that an assignment was recorded coupled with its production by a subsequent assignee, is sufficient evidence of its delivery. Shelby Steel Tube Co. *v.* Delaware Seamless Tube Co., 151 Fed. Rep. 64, affi'd Delaware Seamless Tube Co. *v.* Shelby Steel Co., 160 Fed. Rep. 928, 88 C. C. A. 110. An assignment may be proved by the testimony of a subscribing witness. Ibid.

[75] Id., Brooks *v.* Jenkins, 3 McLean, 432, 436.

Only one subscribing witness to an assignment of a patent need be called unless there is some special reason for requiring more. Shelby Steel Tube Co. *v.* Delaware Seamless Tube Co., 151 Fed. Rep. 64.

[76] Clum *v.* Brewer, 2 Curt. C. Ct. 506.

[77] Allen *v.* Blunt, 2 Woodb. & M. 121, 138; Stimpson *v.* Westchester R. R. Co., 4 How. (U. S.) 380.

[78] Seymour *v.* Osborne, 11 Wall. 516, 541.

or conclusive evidence of its own validity. In an action for the infringement of a reissued patent, plaintiff is not bound to produce the original,[79] and if he does not, defendant must put it in evidence if he desires to object that the reissue was not for the same invention.[80] The presumption arising from the decision of the commissioner of patents, granting the reissue of letters patent, that they are for the same invention which was described in the specification of the original patent, is not conclusive, but can only be overcome by clearly showing, from a comparison of the original specification with that of the reissue, that the former does not substantially describe what is described and claimed in the latter;[81] and on this question the testimony of experts is competent.[82] Nor is it conclusive on the question of fraud.[83] It is *prima facie* evidence that there had been no abandonment.[84] The reissue is also *prima facie*[85] evidence that everything necessary to justify the commissioner in granting the reissue had been produced before the grant was made.[86] A recital that the necessary oaths were taken by the applicants is conclusive.[87] A recital that an assignment had been made to

[79] Id. 546.

[80] Id.

[81] Smith *v.* Goodyear Dental Vulcanite Co., 93 U. S. (3 Otto) 486. If this appear, it is void for excess of authority. Russell *v.* Dodge, 93 U. S. (3 Otto) 460.

It seems that a former adjudication by the court as to the validity of a patent is conclusive unless there is evidence "of strikingly different character or effect" which should lead to a different conclusion. Murray *v.* Detroit Wire Spring Co., 206 Fed. Rep. 465, 124 C. C. A. 371.

[82] Seymour *v.* Osborne, 11 Wall. 516.

[83] Goodyear *v.* Berry, 3 Fish. Pat. Cas. 439, 447; Swift *v.* Whisen, 3 Id. 343, 351.

[84] Hoffheins *v.* Brandt, 3 Fish. Pat. Cas. 218, 239.

[85] If not conclusive. FIELD, J., in Russell *v.* Dodge (above). See paragraph 1 of this chapter.

[86] Hoffheins *v.* Brandt, 3 Fish. Pat. Cas. 218, 219. According to Blake *v.* Stafford, 3 Fish. Pat. Cas. 294, 300, and House *v.* Young, Id. 335, 338, the reissue of a patent is at law conclusive evidence of its own validity, except as against fraud and collusion; irregularity or excess of authority, apparent on the face of the patent, and clear repugnance.

[87] Seymour *v.* Osborne, 11 Wall. 516, 541.

the one receiving the reissue, is *prima facie* evidence of the right of the assignee.[88]

8. State of the Art.

Evidence of the state of the art is admissible in actions at law, under the general issue, without a special notice, and in equity cases, without any averment in the answer touching the subject. It consists of proof of what was old and in general use at the time of the alleged invention. It is received for three purposes, and none other,—to show what was then old; to distinguish what was new; and to aid the court in the construction of the patent.[89] The court can take judicial notice of a device in common knowledge and use of people throughout the country,—such as the ice-cream freezer,—and give it the same effect as if it had been alleged and proved.[90] Prior letters patent, though not set up in the answer, are receivable in evidence to show the state of the art, and to aid in the construction of the claim of the patent issued on, though not to invalidate that claim on the ground of the want of novelty, when properly construed.[91]

9. Infringement.

The burden of proving infringement is on the plaintiff.[92] The declarations and conduct of a workman made while

[88] Hoffheins *v.* Brandt, 3 Fish. Pat. Cas. 218, 241; Middletown Tool Co. *v.* Judd, 3 Fish. Pat. Cas. 141.

[89] Brown *v.* Piper, 91 U. S. (1 Otto) 37, 41; Vance *v.* Campbell, 1 Black, 427, 430. But a prior patent, introduced without notice, to show the state of the art, cannot avail as evidence to anticipate the patented invention. Am. Saddle Co. *v.* Hogg, 5 Fish. Pat. Cas. 353.

An inventor of a new and useful combination is not confined to his combination claims unless all of the elements are old. If any of the elements are new and useful and show invention, these may be claimed and patented. National Malleable Casting Co. *v.* Am. Steel Foundries, 182 Fed. Rep. 626.

[90] Brown *v.* Piper (above).

[91] Grier *v.* Wilt, 120 U. S. 412.

[92] Hudson *v.* Draper, 5 Fish. Pat. Cas. 256, 259; Valvona-Marchiony Co. *v.* Perella, 207 Fed. Rep. 377; Fried Krupp Aktien Gesellschaft *v.* Midvale Steel Co., 191 Fed. Rep. 588, 112 C. C. A. 194.

manufacturing the infringing article, in the course of his employment, are competent against the employer to show infringement.[93] Similarity of the articles produced, without other evidence of similarity of process, is not alone sufficient evidence of infringement of process.[94] If the alleged infringement is of a combination only, and use of a part only is shown, evidence that the other part claimed is immaterial, is not competent.[95]

Testimony of experts is not competent directly to the question whether there has been an infringement. On this question their testimony is admissible for two purposes: 1. To point out and explain the points of actual resemblance or difference; 2. To state, as matter of opinion, whether those resemblances or differences are material; whether they are important or unimportant; whether the changes introduced are merely the substitution of one mechanical or chemical equivalent for another, or whether they constitute a real change of structure or composition, affecting the substance of the invention.[96]

10. Witnesses: Models.

The competency of witnesses depends on the laws of the State in which the court is held.[97]

The testimony of experts is competent to show the state of the art at a given time,[98] to explain the meaning of terms

[93] Aiken *v.* Bemis, 3 Woodb. & M. 348.

[94] Curt. on Pat. 414, § 313. But see Waterbury Brass Co. *v.* N. Y. & Brooklyn Brass Co., 3 Fish. Pat. Cas. 43, 50.

[95] Coolidge *v.* McCone, 2 Sawy. 571.

"A combination claim is never infringed except by the use of every element of the combination, or its equivalent." Morton Trust Co. *v.* Standard Steel Car Co., 177 Fed. Rep. 931, 101 C. C. A. 211.

[96] Curt. on Pat. 648, § 489.

"Patentable difference does not of itself tend to negative infringement." Herman *v.* Youngstown Car Mfg. Co., 191 Fed. Rep. 579, 112 C. C. A. 185.

[97] U. S. Comp. Stat., § 1464. Except that there can be no exclusion for color, and that the incompetency to testify, against executors, &c., is specially regulated by the statute quoted in chapter IV, paragraph 26 of this vol.

[98] Paragraph 8; General Electric

of art,[99] to explain the drawings, models and machines exhibited, and their operation, and to point out the identity, resemblance or difference of the mechanical device involved,[1] but not to tell what the patent is for, nor whether it had been violated.[2] The machines themselves, or the models showing them, are the most cogent kind of evidence.[3]

11. Admissions and Declarations.

Admissions and declarations by the assignor of a patent made after transfer, are not competent against those claiming under him.[4]

12. Certified Copies.

Written or printed copies of any records, books, papers, or drawings belonging to the Patent Office, and of letters patent, authenticated by the seal and certified by the commissioner or acting commissioner, are evidence in all cases wherein the originals could be evidence.[5] Copies of the specifications and drawings of *foreign* letters patent, certified as above, are *prima facie* evidence of the fact of the granting thereof, and of the date and contents.[6] The printed copies

Co. *v.* Germania Electric Lamp Co., 174 Fed. Rep. 1013.

[99] See Chapter XXVI, paragraphs 11 *et seq.* of this vol.

[1] Corning *v.* Burden, 12 How. U. S. 252; Hudson *v.* Draper, 5 Fish. Pat. Cas. 256, 259; and see paragraphs 2, 5, 7, and 9.

The deposition of a party to an interference should not be suppressed or excluded on the ground that he refused under advice of counsel to answer certain questions where the relevancy of the questions was not pointed out. Jansson *v.* Larsson, 30 App. D. C. 203.

[2] Waterbury Brass Co. *v.* N. Y. & Brooklyn Brass Co., 3 Fish. Pat. Cas. 43, 54.

[3] Morris *v.* Barrett, 1 Fish. Pat. Cas. 461, 463.

[4] Wilson *v.* Simpson, 9 How. U. S. 109; Many *v.* Jagger, 1 Blatchf. 372, Chapter I, paragraph 27 of this vol.

A wider range of cross examination is allowed where the witness is a party to the proceedings. Jansson *v.* Larsson, 30 App. D. C. 203.

[5] U. S. Comp. Stat., § 1505.

But uncertified copies of patents are incompetent. National Cash Register Co. *v.* Gratigny, 213 Fed. Rep. 463, 130 C. C. A. 109.

[6] U. S. Comp. Stat., § 1506.

of specifications and drawings of patents, which the commissioner of patents is authorized to print for gratuitous distribution, and to deposit in the capitals of the States and Territories, and in the clerks' offices of the District Courts, are, when certified by him and authenticated by the seal of his office, competent evidence of all matters therein contained.[7] As to the genuineness of the original, the certified copy is presumptive evidence.[8] As to the accuracy of the copy, it is conclusive,[9] subject to correction by producing another certified copy,[10] with corroborative prove of its superior correctness. The court will take judicial notice as to who was commissioner,[11] or acting commissioner.[12]

13. Damages.

A plaintiff seeking to recover more that nominal damages must show his damages by evidence.[13] The law does not presume that sales made by the infringer would otherwise have been made by the patentee.[14] Established license fees

[7] Id., § 1507.

[8] Parker *v.* Haworth, 4 McLean, 370.

[9] Id.

On a question of infringement, an obvious typographical error in a claim should be treated as corrected. Herman *v.* Youngstown Car Mfg. Co., 191 Fed. Rep. 579, 112 C. C. A. 185.

[10] Brooks *v.* Jenkins, 3 McLean, 432, 434; and see Woodworth *v.* Hall, 1 Woodb. & M. 248, 260; Emerson *v.* Hogg, 2 Blatchf. 1, 12.

[11] York & Maryland R. R. Co. *v.* Winans, 17 How. (U. S.) 30.

[12] Woodworth *v.* Hall, 1 Woodb. & M. 248, 389.

[13] Philp *v.* Nock, 17 Wall. 460, 462; Blake *v.* Robertson, 94 U. S. (4 Otto) 728; McSherry Mfg. Co. *v.* Dowagiac Mfg. Co., 160 Fed. Rep. 948, 89 C. C. A. 26.

Where the value of a patented device is due partly to an unpatented feature, the burden is on the plaintiff to show what part of the value is to be attributed to the patented portion. Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. ed. 398. Where the infringement is deliberate, if there is any uncertainty as to the profits realized by the defendants, it is for them, and not for the complainants, to clear up such uncertainty. Novelty Glass Mfg. Co. *v.* Brookfield, 170 Fed. Rep. 946, 95 C. C. A. 516.

[14] Seymour *v.* McCormick, 16 How. U. S. 480, rev'g 2 Blatchf. 240. As to the measure of dam-

are the best measure of damages. There may be damages beyond this, such as the expense and trouble the plaintiff has been put to by the defendant, and any special inconvenience he has suffered from the wrongful acts of the defendant; but these are matters properly the subjects of allowance by the court, under the authority given to it to increase the damages.[15]

14. Defenses: General Issue: Burden of Proof.

The enumeration of defenses in the statute does not exclude evidence of other defenses not mentioned, such as that defendant has a prior patent;[16] or a license from the patentee;[17] or that he never did the acts charged;[18] or that there is a substantial difference in their de-

ages, see Burdell *v.* Denig, 92 U. S. (2 Otto) 716, and cases cited; Birdsall *v.* Coolidge, 93 Id. 64, and cases cited; Cawood Patent, 94 Id. 695, and cases cited; Am. Law Review, vol. xiii., No. 1, p. 1.

To entitle the patentee to recover the profit he would have realized on the same number of articles, he must show that he could have supplied them, and would have made the sales that were made by the defendant. McSherry Mfg. Co. *v.* Dowagiac Mfg. Co., 160 Fed. Rep. 948, 89 C. C. A. 26.

Where the defendant in an action for an accounting of profits refuses to produce his books showing sales of the infringing article, testimony of his employees showing approximately the value of sales is admissible. Yesbera *v.* Hardesty Mfg. Co., 166 Fed. Rep. 120, 92 C. C. A. 46.

[15] Clark *v.* Wooster, 119 U. S. 322, 326.

In the absence of an established royalty, the plaintiff may show what would have been a reasonable royalty. Dowagiac Mfg. Co. *v.* Minnesota Moline Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. ed. 398.

The same elements cannot be duplicated both as damages and profits. Yesbera *v.* Hardesty Mfg. Co., 166 Fed. Rep. 120, 92 C. C. A. 46.

The law requires only a reasonable degree of certainty in calculating profits. Fullerton Walnut Growers' Ass'n *v.* Anderson Barngrover Mfg. Co., 166 Fed. Rep. 443, 92 C. C. A. 295.

[16] Gray *v.* James, Pet. C. Ct. 394, 400; Corning *v.* Burden, 15 How. (U. S.) 252.

[17] Whittemore *v.* Cutter, 1 Gall. 429, 435.

[18] Id.

vices; [19] or that the patentee is an alien.[20] These may be given in evidence at common law under the general issue.

Plaintiff's patent, title, etc., having been proved, the *burden* is on a defendant setting up insufficient specification; [21] or prior description in a printed publication; [22] or prior use or sale; [23] or abandonment,[24] to establish it affirmatively.

15. — Title; License.

One who relies on an equitable title against the legal title, has the burden of alleging and proving it.[25] In the absence of anything to indicate the contrary, a license is presumed to relate only to the existing right.[26] Admissions of the owner to defendant, that a third person granting defendant a license had the right to do so, will estop the owner as to subsequent acts done in reliance on these admissions and before notice of withdrawal.[27] If the only issues are on the validity of plaintiff's patent and on infringement, the fact that the defendant is the licensee of the owner of another patent, and

[19] Evans *v.* Hettich, 7 Wheat. 453, 469.

[20] Id.; Kneass *v.* Schuylkill Bank, 4 Wash. C. Ct. 9. In case of this defense the burden is on defendant to show the neglect or refusal to sell. Tatham *v.* Lowber, 2 Blatchf. 49.

[21] Brooks *v.* Jenkins, 3 McLean, 432, 445, 447.

[22] Cohn *v.* U. S. Corset Co., 12 Blatchf. 225, 231.

[23] Am. Hide & Leather, &c. Co. *v.* Am. Tool & Machine Co., 5 Fish. Pat. Cas. 284. But when the defendant shows that the machine which he is using, and which is claimed to be an infringement, was patented and in use before the date of the plaintiff's patent, the burden of proof is on the latter to show that his invention preceded that of the machine which the defendant is using. Clark Thread Co. *v.* Willimantic Linen Co., 140 U. S. 481.

A defendant setting up prior use must establish it beyond a reasonable doubt. Mygatt *v.* Schaffer, 218 Fed. Rep. 827, 134 C. C. A. 515.

[24] Id.; Johnson *v.* Fassman, 1 Wood, 138.

[25] Curt. on Pat. 625, § 472; Gibson *v.* Cook, 2 Blatchf. 144, 151. If he relies on plaintiff's contract he must prove performance of conditions precedent. Brooks *v.* Stolley, 2 McLean, 523.

[26] Gibson *v.* Cook, 2 Blatchf. 144.

[27] Gear *v.* Grosvenor, 6 Fish. Pat. Cas. 314, 323.

that his machine is constructed in accordance with that patent, is irrelevant.[28]

16. — Defendant's Patent.

If defendant has a patent for the alleged infringement, he may put it in evidence; and it raises the general presumptions in its own favor, already stated in treating of plaintiff's evidence; [29] but if later than plaintiff's, the patent does not overcome the presumption of novelty, originality and priority, raised by the earlier.[30]

On a question of interference, the subsequent patent, granted by the same official experts, is *prima facie* evidence, that the latter does not interfere with the former.[31] A comparison of the things or machines,[32] and the testimony of experts,[33] are competent; and the question is one of evidence

[28] Blanchard *v.* Putnam, 8 Wall. 420, 426. Otherwise on motion for injunction.

[29] Corning *v.* Burden, 15 How. U. S. 252, 271.

On an interference, the fact that one party was granted a patent while the other party's application was pending, gives him no advantage and he has the ordinary burden of the junior party in interference. Fenner *v.* Blake, 30 App. D. C. 507.

[30] Goodyear Dental Vulc. Co. *v.* Gardner, 5 Fish. Pat. Cas. 224, 229.

The fact that the defendant operated under a subsequent patent does not afford a conclusive presumption that he is not infringing. Oregon Woodenware Mfg. Co. *v.* Murray, 215 Fed. Rep. 744.

In fact it has very little probative value and some cases seem to have denied the existence of any presumption whatever. Herman *v.* Youngstown Car Mfg. Co., 191 Fed. Rep. 579, 112 C. C. A. 185; Murray *v.* Detroit Wire Spring Co., 206 Fed. Rep. 465, 124 C. C. A. 371.

[31] Westlake *v.* Cartter, 6 Fish. Pat. Cas. 519, 526, 527.

The fact that the patent office has recognized a patentable difference in two machines, is not conclusive, but raises a presumption that such patentable difference exists. Sharp *v.* Bellinger, 168 Fed. Rep. 295.

The granting of a later patent is *prima facie* evidence of a patentable difference. Gillette Safety Razor Co. *v.* Durham Duplex Razor Co., 197 Fed. Rep. 574.

[32] Evans *v.* Hettich, 7 Wheat. 453, 469.

[33] Bischoff *v.* Wethered, 9 Wall. 812, 814, and authorities cited.

for the jury.[34] Evidence of the relative superiorty of defendant's invention is not competent except for the purpose of showing a substantial difference.[35]

17. — the Statute.[36]

"In any action for infringement, the defendant may plead the general issue, and, having given notice in writing [37] to the plaintiff or his attorney, thirty days before,[38] may prove on trial any one or more of the following special matters:

"*First.* That for the purpose of deceiving the public, the description and specification filed by the patentee in the Patent Office was made to contain less that the whole truth relative to his invention or discovery, or more than is necessary to produce the desired effect; or,

"*Second.* That he had surreptitiously or unjustly obtained the patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same; or,

"*Third.* That it had been patented or described in some printed publication prior to his supposed invention or discovery thereof or more than two years prior to his application for a patent therefor; or,

"*Fourth.* That he was not the original and first inventor or discoverer of any material and substantial part of the thing patented; or,

"*Fifth.* That it had been in public use or on sale in this country for more than two years before his application for a patent, or had been abandoned to the public.

"And in notices as to proof of previous invention, knowl-

[34] Id.

[35] Alden *v.* Dewey, 1 Story C. Ct. 336, s. c., 3 Law. Rep. 383. As to what is a substantial difference, see Seymour *v.* Osborne, 11 Wall. 516, 556.

[36] U. S. Comp. Stat., § 9466.

[37] The burden is on defendant to show that the required notice was given. Blanchard *v.* Putnam, 8 Wall. 420; Phila. & Trenton Railroad Co. *v.* Stimpson, 14 Pet. 448.

[38] In the eighth circuit, the first day of term is regarded as the day of trial within this rule. Westlake *v.* Cartter, 6 Fish. Pat. Cas. 519, 521.

edge, or use of the thing patented, the defendant shall state the names of the patentees and the dates of their patents, and when granted, and the names and residences of the persons alleged to have invented, or to have had the prior knowledge of the thing patented, and where and by whom it had been used; and if any one or more of the special matters alleged shall be found for the defendant, judgment shall be rendered for him, with costs.

And the like defenses may be pleaded in any suit in equity for relief against an alleged infringement; and proofs of the same may be given upon like notice in the answer of the defendant, and with the like effect."

18. — Fraud.

Fraud in obtaining the patent is not admissible in a collateral proceeding, except in a case within U. S. R. Comp. Stat. § 9466,[39] or in equity in a case within § 9463.[40]

19. — Description in Printed Publication.

The publication may be proved orally or by the production of the book.[41] But the work is evidence only of the fact of description contained in it. Its statements are not evidence, for instance, of continuous use.[42] If the publication

[39] Paragraph 17; and see Rubber Co. *v.* Goodyear, 9 Wall. 788, 797; Gear *v.* Grosvenor, 6 Fish. Pat. Cas. 314, 316.

[40] Rubber Co. *v.* Goodyear, (above); Gear *v.* Grosvenor, (above).

[41] Allen *v.* Hunter, 6 McLean, 303, 314. As to the sufficiency of a description in a prior printed publication for this purpose, compare Seymour *v.* Osborne, 11 Wall. 516, 555; Cohn *v.* U. S. Corset Co., 93 U. S. (3 Otto) 366, 377.

[42] Seymour *v.* McCormick, 19 How. (U. S.) 96. And evidence that it was in use at a later period will not alone sustain a finding that it had been in continuous use since the time of the description. Id. As to what is evidence of publication, for this purpose, see Plimpton *v.* Malcolmson, 3 Chan. Div. 531, s. c., 18 Moak's Eng. 649; Brooks *v.* Norcross, 2 Fish. Pat. Cas. 661. As to notice of publication. Silsby *v.* Foote, 14 How. (U. S.) 218, affi'g 1 Blatchf. 445.

describes the thing sufficiently to show its structure, the existence of the thing as described need not be proved.[43]

20. — Prior Knowledge or Use.

The claim of original invention is not defeated by showing the construction of the improvement before the patent issued; but it must be shown that the construction preceded the invention of the patentee; that is, was before the conception of the improvement was applied in practice.[44] Evidence that the thing existed is not enough, without evidence to show that it was not of plaintiff's invention.[45] Evidence of prior existence by the invention of some one other than the patentee, is enough without evidence that the thing was ever used.[46] Prior knowledge and use, though by but a single individual, is enough.[47] A prior patent, describing the thing, is competent without explanation of the cancellation.[48] The omission to produce the alleged prior device corroborates a denial of its existence.[49] Evidence that plaintiff had admitted the prior existence of a device of the same general nature is not sufficient, unless the admission excluded any field of invention within which his patent can be sustained.[50]

[43] Cohn *v.* U. S. Corset Co., 12 Blatchf. 225, 234.

[44] Brodie *v.* Ophir Silver Mining Co., 5 Sawy. 608, s. c., 4 Fish. Pat. Cas. 137.

[45] Treadwell *v.* Bladen, 4 Wash. C. Ct. 703.

[46] Parker *v.* Ferguson, 1 Blatchf. 407. But failure to prove general use corroborates a denial. Sayles *v.* Chicago & N. W. R. R. Co., 5 Fish. Pat. Cas. 584.

The validity of a patent is not affected by its non use. Westinghouse Electric, etc., Co. *v.* Toledo, etc., R. Co., 172 Fed. Rep. 371, 97 C. C. A. 69.

[47] Coffin *v.* Ogden, 18 Wall. 124, and cases cited. So held under Act of 1836.

The mere fact that a process had been used by chance by another, will not affect the validity of the patent of that process. Karfiol *v.* Rothner, 165 Fed. Rep. 923.

[48] Delano *v.* Scott, Gilp. 489.

[49] Chase *v.* Wesson, 6 Fish. Pat. Cas. 517; Blake *v.* Eagle Works Mfg. Co., 5 Id. 591.

[50] Turrill *v.* Mich. So., &c. R. R. Co., 1 Wall. 491, 501. Defendant's circulars, announcing the device as new, may countervail oral testimony to earlier use. Masury *v.* Tiemann, 5 Fish. Pat. Cas. 524.

Every reasonable doubt should be resolved against an infringer setting up that the patentee was not the original and first inventor.[51] One witness is enough to sustain a finding of priority.[52] The court ought to be fully convinced by a clear preponderance of evidence.[53] When an unpatented device, the existence and use of which are proven only by oral testimony, is set up as a complete anticipation of a patent, the proof sustaining it must be clear, satisfactory and beyond a reasonable doubt.[54]

21. — Public Use or Sale Before Application; Abandonment.

Public use, etc., if relied on must be alleged. Defendant must show that the invention, as finally perfected, was on sale and in public use more than two years before application.[55]

Abandonment if relied on must be alleged. Distinct evidence of it is necessary; the presumption being that an inventor of a machine would not give it to the world. The inventor is not estopped by licensing a few persons to use his invention, to ascertain its utility, or by any such acts of peculiar indulgence and use as may fairly consist with the clear intention to hold the privilege;[56] but, if clear acts of

[51] Coffin *v.* Ogden, 18 Wall. 124; Washburn *v.* Gould, 3 Story C. Ct. 122, 142.

[52] Whitney *v.* Emmett, Baldw. 303, 310.

[53] Gear *v.* Grosvenor, 6 Fish. Pat. Cas. 314.

[54] The Barbed Wire Patent, 143 U. S. 275; Mast *v.* Dempster Mill Mfg. Co., 49 U. S. App. 508, 82 Fed. Rep. 327. Oral testimony, unsupported by patents or exhibits, tending to show prior use of a patented device, is open to grave suspicion. Deering *v.* Winona Harvester Works, 155 U. S. 286.

Where want of invention is set up as a defense and the patent relates to a complex subject, explanatory testimony should be introduced to explain the defense. Malignani *v.* Hill-Wright Electric Co., 177 Fed. Rep. 430.

[55] Agawam Co. *v.* Jordan, 7 Wall. 583, 609.

[56] Hovey *v.* Henry, 3 West. Law J. 155; Pitts *v.* Hall, 2 Blatchf. 229. Evidence that the inventor of a pavement frequently visited and examined an experimental block, laid to test its durability, and inquired how people liked it, and stated that this was his first

abandonment are shown, the mental intent is not material.[57] Mere delay, which does not amount to gross laches, is not sufficient.[58]

Abandonment of an invention never patented, may be proved by showing that the inventor, after constructing it and before reducing it to practice, broke it up as something requiring more thought and experiment, and laid the parts aside as incomplete, provided it appears that those acts were done without any definite intention of resuming his experiments and of restoring the machine, with a view to applying for letters patent.[59] Oral declarations by the owner of a patent, of intention to abandon or dedicate to the public, are competent, but not alone sufficient evidence of abandonment.[60]

experiment with it; that the place where it was laid was well calculated to give it a thorough and severe trial; and that it was laid at his own expense, is, when corroborated, sufficient to show that it was intended as an experiment to test its usefulness and durability merely, and not an abandonment to public use. Elizabeth *v.* Pavement Co., 97 U. S. (7 Otto) 126, 134, 135.

The benefit of an earlier conception may be lost by want of diligence in seeking to perfect the invention. Jansson *v.* Larsson, 30 App. D. C. 203.

[57] The issuance of letters patent by the patent office is *prima facie* evidence that the invention they protect was not in public use or on sale for more than two years prior to the filing of the application on which they are based, and that it was not proved to be abandoned. Mast *v.* Dempster Mill Mfg. Co., 49 U. S. App. 508, 82 Fed. Rep. 327. Testimony on the trial, that he never did intend to abandon it, is entitled to very little consideration, in view of undisputed acts which were very cogent evidence of abandonment. Bevin *v.* East Hampton Bell Co., 5 Fish. Pat. Cas. 23, 29.

[58] Johnson *v.* Fassman, 1 Wood, 138.

[59] Seymour *v.* Osborne, 11 Wall. 516, 552; Parkhurst *v.* Kinsman, 1 Blatchf. 488, 494; affi'd on other points, 18 How. (U. S.) 289.

Want of due diligence by a party to an interference, who was the first to conceive but the last to reduce to practice is not excused on the ground of poverty, where it appeared that he preferred to enlarge his old business rather than perfect his new invention, and that his financial embarrassments did not occur until after the filing date of the other party. McArthur *v.* Mygatt, 31 App. D. C. 514.

[60] Pitts *v.* Hall, 2 Blatchf. 229.

Abandonment, whether before[61] or after[62] the issue of patent, should be pleaded if relied on.

22. — Requisites of the Statutory Notice or Answer.

Substantial compliance with the requirement of notice is enforced.[63] A notice that fairly puts an adversary in that way that he may ascertain all that is necessary to his defense or answer, is enough to admit the evidence.[64]

23. — Plaintiff's Failure to Mark.

If failure to mark is relied on, it must appear that the plaintiffs have made or sold articles under the patent, and have failed to mark them as required. This would throw on the plaintiffs, in an action at law for damages, the burden of showing that before suit was brought, the defendants were duly notified that they were infringing the patents, and that they continued, after such notice, to make or vend the article patented.[65]

[61] Agawam Co. *v.* Jordan, 7 Wall. 609; Union Paper Bag Co. *v.* Newell, 11 Blatchf. 549.

[62] Wyeth *v.* Stone, 1 Story C. Ct. 273, s. c., 4 Law Rep. 54.

[63] Thus, evidence that the thing was first invented by another person, admitted under an unsuccessful averment of fraud upon such person, cannot avail as proof that the complainant was not the original and first inventor under a general denial of the allegation that he was, and without notice. Agawam Co. *v.* Jordan, 7 Wall. 583, 596.

[64] Wise *v.* Allis, 9 Wall. 737, 740; Smith *v.* Frazer, 5 Fish. Pat. Cas. 543, 547. As to requisite notice of the *names*, &c., of witnesses, see Treadwell *v.* Bladen, 4 Wash. C. Ct. 703; Many *v.* Jagger, 1 Blatchf. 372; Evans *v.* Kremer, Pet. C. Ct. 215; Blanchard *v.* Putnam, 8 Wall. 420; Decker *v.* Grote, 6 Fish. Pat. Cas. 143, 144; Judson *v.* Cope, 1 Id. 615, 617; Union Paper Bag Co. *v.* Newell, 11 Blatchf. 549; Collender *v.* Griffith, 11 Id. 212; Am. Hide & Leather Spl. & Dr. Mach. Co. *v.* Am. Tool & Mach. Co., 5 Fish. Pat. Cas. 284, 305; Wilton *v.* Railroads, 1 Wall. Jr. C. Ct. 192. As to *places* of use, see Evans *v.* Eaton, 3 Wheat. 454; Dixon *v.* Moyer, 4 Wash. C. Ct. 68. Patents may be given in evidence to show the state of the art, without notice, but printed publications cannot. Westlake *v.* Cartter, 6 Fish. Pat. Cas. 519.

[65] Goodyear *v.* Allyn, 3 Fish. Pat. Cas. 374, 376.

The complainant has the burden

II. COPYRIGHTS

24. Plaintiff's Right.

The burden is on plaintiff to prove both his copyright [66] and the infringement.[67] A duly authenticated certificate of the deposit of title, is *prima facie* evidence of deposit in due form.[68] Sale of a book is *prima facie* evidence of publication.[69] Assignment of the right to copy a picture may be proved by oral evidence.[70]

25. Infringement.

A general allegation of infringement admits evidence of the parts which are piratical.[71] Substantial identity or striking resemblance will sustain a presumption of unlawful copying.[72] Occurrence of the same inaccuracies in the

of alleging and proving either that the patented article was marked or that the defendant had direct notice. Lorain Steel Co. *v.* N. Y. Switch & Crossing Co., 153 Fed. Rep. 205.

[66] Jollie *v.* Jaques, 1 Blatchf. 627; Drone on Copyr. 498, and cases cited. Under a completed entry. Keene *v.* Wheatley, 9 Am. Law Reg. 45.

[67] Drone on Copyr. 478.

[68] Roberts *v.* Meyers, 13 Law Rep. N. S. 396. As to certified copies, see paragraph 12.

But the certificate of the Register of copyrights is not even presumptive evidence that copies of the publication were received in due time. It shows merely that they were delivered on the date specified in an effort to comply with the statute. Davies *v.* Bowes, 219 Fed. Rep. 178, 134 C. C. A. 552.

[69] Baker *v.* Taylor, 2 Blatchf. 82.

But the author of a manuscript play does not lose his rights therein by a public performance of the drama. Frohman *v.* Ferris, 238 Ill. 430, 87 N. E. Rep. 327, 128 Am. St. Rep. 135, 43 L. R. A. N. S. 639.

[70] Parton *v.* Prang, 3 Cliff. 537, s. c., 5 Am. L. T. R. 105.

[71] Drone on Copyr. 512, 513.

[72] Id., 400, and cases cited.

Mere differences in phrasing, style, etc., are insufficient to rebut an inference of infringement. Chautauqua School of Nursing *v.* National School of Nursing, 211 Fed. Rep. 1014.

The fact that the defendant has expanded the plot of the story or introduced additional characters is unimportant, if he has taken the substance of the complainant's authorship. Dam *v.* Kirke La Shelle Co., 166 Fed. Rep. 589.

two works is evidence of copying;[73] and if such passages are numerous, they will sustain the further inference that other passages which are the same with passages in the original book, were likewise copied.[74] Resemblances striking enough to warrant the inference of piracy, may cast the burden on defendant to show that they were not the result of copying.[75] Defendant's evidence that the passages in question are to be found in other works than the plaintiff's, is not enough, without showing that he actually got the matter from the common source, unless the other works were prior to plaintiff's; nor even then if the method and course of selection in defendant's work resembles that of plaintiff's. If a clear infringement is shown, innocent intent is not material.[76]

Where the defense is delay or acquiescence, the burden of showing plaintiff's knowledge of the piratical publication is on defendant.[77] So, where the defense is that the common-

[73] Curt. on Copyr. 254, 255, citing Longman *v.* Winchester, 16 Ves. 269; see also Drone on Copyr. 428; Frank Shepard Co. *v.* Zachary P. Taylor Pub. Co., 193 Fed. Rep. 991, 113 C. C. A. 609.

[74] Curt. on Copyr. 255.

"Proof of a considerable number of errors common to both publications occurring first in the complainant's and none occurring first in the defendant's created a *prima facie* case of copying by the defendant which it was bound to explain." Frank Shepard Co. *v.* Zachary P. Taylor Pub. Co., 193 Fed. Rep. 991, 113 C. C. A. 609.

[75] Drone on Copyr. 430.

The efforts which a defendant made to avoid copying by its employees "are to be considered in determining whether equitable relief should be granted because of the unwitting profit and use which was gained from the insertion of material which violated the rights of others, in spite of the efforts to prevent such a result." West Publishing Co. *v.* Edward Thompson Co., 169 Fed. Rep. 833.

[76] 2 Abb. Nat. Dig. 6; Webb *v.* Powers, 2 Woodb. & M. 512, 524; Millett *v.* Snowden, 1 West. L. J. 240; Drone on Copyr. 401–403. Mode of proof of infringement of drama. Boucicault *v.* Fox, 5 Blatchf. 87; Hein *v.* Harris, 183 Fed. Rep. 107, 105 C. C. A. 399.

Where the defendant publishes a copyrighted work with knowledge of the copyright, his intent is immaterial. Stern *v.* Jerome H. Remick & Co., 175 Fed. Rep. 282.

[77] Drone on Copyr. 505; Chappell *v.* Sheard, 1 Jur. N. S. 997.

Laches of the complainant and hardship upon the defendant may constitute a reason for refusing an injunction and an accounting of profits. West Publishing Co. *v.*

law right to a dramatic composition has been lost by publication, the burden of showing that the publication was authorized, is on the defendants.[78]

Edward Thompson Co., 169 Fed. Rep. 833.

[78] Drone on Copyr. 578, 579; Boucicault *v.* Wood, 2 Biss. 34.

CHAPTER LVI

ACTIONS FOR VARIOUS CAUSES CREATED OR DEFINED BY STATUTE

I. MECHANIC'S LIEN.

1. Mode of proof.

II. INDIVIDUAL LIABILITY OF STOCKHOLDERS AND TRUSTEES OR CORPORATIONS AND JOINT STOCK COMPANIES.

2. Incorporation: Bankruptcy.
3. Defendant a stockholder.
4. — a director or trustee.

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V. PROCEEDINGS IN REM FOR FORFEITURE.

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43. Admissions and declarations.
44. Cogency of proof.

VI. ACTIONS ON RECOGNIZANCES.

45. Mode of proof.

I. MECHANIC'S LIEN

1. Mode of Proof.

The essential facts, and the burden of proof, depend upon the statute.[79] The notice of lien is not proved by the county clerk's certified copy;[80] but his certificate proves the filing. Mortgagees and others acquiring interest in property against which the lien is claimed, have a right to call for strict proof of all that is essential to the creation of the lien; and this includes proof of the commencement of the work, of its character and of its completion.[81]

[79] For the mode of proving a right of action for goods or services, see Chapters XVI, XIX; Darlington *v.* Eldridge, 88 Mo. App. 525.

The statute will be strictly construed and the evidence must establish the exact facts required. Ludwig *v.* Huverstuhl, 108 Ill. App. 461.

The burden is on the plaintiff to show due filing of the lien. Stidger *v.* McPhee, 15 Colo. App. 252, 62 Pac. Rep. 332.

If the lien is once established, the burden is on the owner of the estate charged to show its relinquishment. Kirkwood *v.* Hoxie, 95 Mich. 62, 54 N. W. Rep. 720, 35 Am. St. Rep. 549.

[80] Unless the statute so provides. Sampson *v.* Buffalo, N. Y. & Phila. R. R. Co., 4 Supm. Ct. (T. & C.) 600.

Under a statute providing that a lien must be filed within four months after the indebtedness accrues, the time begins to run on the completion of the work. Rodefeld *v.* Winklemann, 156 Mo. App. 130, 136 S. W. Rep. 4. Errors in the statement of lien as to the dates when material was furnished do not impair the lien where such errors are harmless and immaterial. Coughlan *v.* Longiui, 77 Minn. 514, 80 N. W. Rep. 695.

One who wishes to bring himself within exceptions saving a lien from invalidity because of inaccuracies in the statement thereof which are harmless, has the burden of proof. Donnelly *v.* Butler, 216 Mass. 41, 102 N. E. Rep. 917.

[81] Davis *v.* Alvord, 94 U. S. (4 Otto) 545, 547; Hahn *v.* Bonacum, 76 Neb. 837, 107 N. W. Rep. 1001, 109 N. W. Rep. 368.

The certificate of lien together with the testimony of an attorney as to the amount due, is not sufficient evidence to support a decreee of foreclosure. Urlau *v.* Ruhe, 63 Neb. 883, 89 N. W. Rep. 427.

The property upon which the lien is claimed must be clearly identified by the evidence. Eastmore *v.* Bunkley, 113 Ga. 637, 39 S. E. Rep. 105.

II. INDIVIDUAL LIABILITY OF STOCKHOLDERS AND TRUSTEES OF CORPORATIONS AND JOINT STOCK COMPANIES

2. Incorporation: Bankruptcy.

The incorporation may be proved in the manner stated in Chapter III. Proof of a certificate of organization in which defendant joined, duly verified and filed, and of user under it by acts in which he joined, is conclusive evidence of incorporation as against the defendant.[82] A general averment of dissolution admits evidence of the grounds of dissolution.[83]

Proof of *bankruptcy*, or the appointment of and transfer of all assets to a receiver, and inadequacy of assets,[84] dispenses with a statutory requirement of prior action against the company.[85]

3. Defendant a Stockholder.

A charter duly proved is *prima facie* evidence of the membership of one named therein as a member at the commencement of the corporate existence. The stock subscription paper,[86] shown to have been signed by defendant,[87] or the book containing a list of stockholders, kept under the statute,[88] is competent. In the absence of such a statute, the

It has been held that the lien was not established where it appeared that the contract was not completed, that the work was not properly performed and was of no value. McLaughlin *v.* Sayle, 190 Mass. 583, 77 N. E. Rep. 639.

A judgment enforcing a lien will not be set aside on the ground that it is opposed merely to the preponderance of evidence. Thayer *v.* Williams, 65 Mo. App. 673.

[82] Priest *v.* Essex Hat Mfg. Co., 115 Mass. 380.

[83] Thomps. Liab. of St. 379, § 312.

[84] Id., 388, §§ 321–3.

[85] Id., 384, § 318. For the mode of proving exhaustion of remedy, see chapter LI, paragraph 2 of this vol.

[86] Partridge *v.* Badger, 25 Barb. 146, 171.

[87] Corse *v.* Sanford, 14 Iowa, 235, 239.

A stockholder who has been induced to become such by the fraud of the corporation may be relieved of liability if he takes seasonable steps to purge the corporate records of his name as a stockholder. Bartlett *v.* Stephens (Minn.), 163 N. W. Rep. 288.

[88] Johnson *v.* Underhill, 52 N. Y. 203; Shellington *v.* Howland, 53

corporation books are not, alone, competent evidence against a stranger to prove him a stockholder.[89] Active participation as a stockholder in corporate meetings and transactions is presumptive evidence that he was a stockholder at that time.[90] Evidence that defendant was a trustee is presumptive evidence that he was a stockholder.[91] One who has purchased stock, and suffered his name to appear on the books of the association, is estopped from impeaching his own title.[92] Defendant may show an apparently absolute assignment of stock to have been made and taken as collateral only.[93]

N. Y. 371. When the name of an individual appears on the stock book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock; and in an action against him as a stockholder the burden of proving that he is not a stockholder, or of rebutting the presumption, is cast upon him. Holland *v.* Duluth Iron, &c. Co., 65 Minn. 324, 68 N. W. Rep. 50.

[89] Thomps. Liab. of St. 430, § 370; Steed *v.* Henry, 120 Ark. 583; 180 S. W. Rep. 508. But a certificate by the president and secretary of a corporation and filed in the clerk's office is *prima facie* evidence. Id.

[90] Id., 197, § 165.

[91] Butterfield *v.* Radde, 38 Super. Ct. (J. & S.) 44, s. c., 47 How. Pr. 535.

"It is well settled that one to whom corporate stock has been transferred in pledge or in trust, or as collateral security for money loaned, but who appears on the books of the corporation as the general owner thereof, is liable as a stockholder for the debts of the corporation." But where it is registered in the stock record of the corporation that the transferee holds the stock as collateral or in trust, he is not liable as a stockholder. Marshall Field & Co. *v.* Evans, 106 Minn. 85, 118 N. W. Rep. 155, 19 L. R. A. N. S. 249.

[92] Thomps. Liab. of St. 194, § 162; 202, § 171; Allen *v.* Edwards, 93 Miss. 719, 47 So. Rep. 382; Kirschler *v.* Wainwright, 255 Pa. 525, 100 Atl. Rep. 484. He fixes his own status. Bartlett *v.* Stephens, 163 N. W. Rep. (Minn.) 288.

A transfer of stock will not release a stockholder from liability for corporate debts existing at the time of the transfer, but it will release him from liabilities created thereafter, if the transfer is made in good faith. Fidelity & Columbia Trust Co. *v.* Edelen, 176 Ky. 376, 195 S. W. Rep. 449.

[93] McMahon *v.* Macy, 51 N. Y. 155.

And he may show that his position as a stockholder was merely nominal. Hanson Sheep Co. *v.*

The burden is on plaintiff to show that the debt was contracted by the corporation.[94] Judgment against the company is not even *prima facie* evidence of the indebtedness as against the stockholder.[95] For this purpose, the transactions between the corporation and their creditor are competent;[96] and the usual presumption supporting the validity of corporate contracts applies.[97]

To recover against the members of a *joint stock company*, after recovery and execution unsatisfied against the president or treasurer under the statute,[98] plaintiff must prove his original cause of action,[99] and also the judgment; and the issue and return of execution unsatisfied.[1] Those proceedings, although against a person named as president or treasurer under the statute, are competent, if it appears from the whole record that it was the association who was the party.[2]

Farmers' & Traders' State Bank, 53 Mont. 324, 163 Pac. Rep. 1151.

[94] Dabney *v.* Stevens, 10 Abb. Pr. N. S. 39; Strong *v.* Wheaton, 38 Barb. 616.

[95] This is the New York rule. McMahon *v.* Macy, 51 N. Y. 155, questioned in Thomps. Liab. of St. 394, § 330. Judgment against the corporation is not in itself conclusive on a stockholder. He should have an opportunity to compel proof of the existence of a claim before he is compelled to pay it. Assets Realization Co. *v.* Howard, 211 N. Y. 430, 105 N. E. Rep. 680. *Contra*, Thayer *v.* New England Litho. Co., 108 Mass. 523. In those jurisdictions where the judgment is competent, extrinsic evidence is admissible, and may be necessary, to ascertain whether the cause of action was one for which a stockholder is liable.

[96] Partridge *v.* Badger, 25 Barb. 146. As to the corporate books, see Chapter III, paragraph 54 of this vol., and Hager *v.* Cleveland, 36 Md. 476.

[97] Belmont *v.* Coleman, 21 N. Y. 96, affi'g 1 Bosw. 188. See Chapter III, paragraph 30 of this vol.

[98] N. Y. Code Civ. Pro., § 1922.

[99] Witherhead *v.* Allen, 4 Abb. Ct. App. Dec. 628, rev'g 28 Barb. 661. As to the mode of proof, see Chapter II of this vol. A different ground of liability from that alleged is a fatal variance. Allen *v.* Clark, 65 Barb. 563, 567.

A stockholder of an insolvent corporation when sued by a creditor may set off an indebtedness of the corporation to him. Austin Powder Co. *v.* Commercial Lead Co., 134 Mo. App. 183, 114 S. W. Rep. 67.

[1] As to execution, see chapter LI, paragraph 2 of this vol.

[2] National Bk. of Schuylerville *v.* Lasher, 1 Supm. Ct. (T. & C.) 313.

The judgment against the association does not preclude the defendants from contesting the original liability.[3]

4. Defendant a Director or Trustee.

Production of the certificate of incorporation, duly filed and certified, naming defendants as trustees, with evidence that the company acted under the corporate name; that they became indebted to plaintiff; and that no statement was filed as required by the act, makes out a *prima facie* case.[4] It is enough to show that defendant was a trustee *de facto*, under color of title to an otherwise vacant office.[5] Election to office is not enough, even though it be re-election, after having acted as director in the previous year. Assent must be shown by some positive act.[6] To charge with holding over, evidence of an act as director, after expiration of term, is necessary.[7] Resignation may be proved by parol, without proof of acceptance, unless the statute or by-laws are to the contrary.[8] On the question whether the defendant was a director, testimony of witnesses though without record, or the record, or the inspector's certificate made at the time

[3] Allen *v.* Clark (above).

[4] Squires *v.* Brown, 22 How. Pr. 35, 42.

One who holds himself out as a director of a corporation is estopped as against a corporate creditor to deny that he was in fact a director. Allen *v.* Edwards, 93 Miss. 719, 47 So. Rep. 382.

[5] As where, after the term expired, there was no new election, and he did some act as trustee thereafter. Deming *v.* Puleston, 55 N. Y. 655, affi'g 35 Super. Ct. (J. & S.) 309; Reed *v.* Keese, 60 N. Y. 616, affi'g 37 Super. Ct. (J. & S.) 269. Otherwise, where there was legally no vacancy. Craw *v.* Easterly, 54 N. Y. 679, affi'g 4 Lans. 513.

[6] Osborne, &c. Co. *v.* Croome, 14 Hun, 164. *Contra*, Nimmons *v.* Tappan, 2 Sweeny, 652.

[7] Reed *v.* Keese, 37 Super. Ct. (5 J. & S.) 269, affi'd in 60 N. Y. 616; Deming *v.* Puleston, 35 Super. Ct. (J. & S.) 309, affi'd in 55 N. Y. 655. Evidence that defendant was present and took part at a meeting of the board, is not enough, unless it appear that he did so as a director. Deming *v.* Puleston, 33 Super. Ct. (J. & S.) 231, 238; 35 Id. 309, 55 N. Y. 655.

[8] Chandler *v.* Hoag, 2 Hun, 613, s. c., 5 Supm. Ct. (T. & C.) 197, affi'd in 12 Alb. L. J. 351. Express resignation and abandonment of incorporation rebuts the presumption of holding over,

of election, are each competent.[9] A judgment against the corporation is not competent.[10]

Neglect to file report in one year does not raise presumption of neglect in subsequent years.[11]

III. PENALTIES

5. Statute.

The officially printed volume is presumptively correct; the original act, conclusive.[12]

6. Municipal Ordinance.

Corporation ordinances must be pleaded to be admissible,[13] and must be proved.[14] At common law, the

which perhaps might arise from failure to hold new election. Wade *v.* Baker, 14 Hun, 615.

[9] Partridge *v.* Badger, 25 Barb. 146, 172.

[10] Miller *v.* White, 50 N. Y. 137, rev'g 59 Barb. 434, s. c., 10 Abb. Pr. N. S. 385, 57 Barb. 504, 8 Abb. Pr. N. S. 46. Except, perhaps, where it is made so by connecting defendant personally with its recovery.

[11] Whitney Arms Co. *v.* Barlow, 41 Super. Ct. (J. & S.) 220, affi'd in 68 N. Y. 34.

[12] Purdy *v.* Com. of Highways, 54 N. Y. 276, chapter III, paragraph 7 of this vol.; State *v.* Swift, 10 Nev. 176, s. c., 21 Am. Rep. 721. *Contra*, that it is conclusive only against oral evidence. Berry *v.* Baltimore & Drum Point R. R. Co., 41 Md. 446, s. c., 20 Am. Rep. 69. See the conflicting cases on this question in 3 Abb. New Cas. 372, note. The date, if stated, is conclusive (Lapeyre *v.* United States, 17 Wall. 191), and if not, may be proved by extrinsic evidence. Gardner *v.* The Collector, 6 Wall. 499, 511.

Printed volumes purporting to be the statutes of another state, are admissible as *prima facie* proof of the statute law of that state. Mullen *v.* Morris, 2 Pa. St. 85.

In New York State the Code of Civil Procedure, § 932, provides the method of proving a state statute and § 942 a foreign one.

[13] Harker *v.* Mayor, &c. of N. Y., 17 Wend. 199. But the existence of the conditions under which the corporation were authorized by statute to pass the ordinance need not be. Stuyvesant *v.* Mayor, &c. of N. Y., 7 Cow. 588; Rector, &c. of Trinity *v.* Higgins, 4 Robt. 1, and cases cited.

Unless otherwise provided by statute, ordinances may be proved by common law methods. Shaw *v.* Alexander, 94 Neb. 774, 144 N. W. Rep. 907.

[14] Except that a court of the

originals, or the books in which they are registered, are the primary evidence.[15] By the New York statute,[16] "An act, ordinance, resolution, by-law, rule or proceeding of the common council of a city, or of the board of trustees of an incorporated village, or of a local board of health of a city, town or incorporated village or of a board of supervisors, within the state, may be read in evidence, wither from a copy thereof, certified by the city clerk, village clerk, clerk of the common council, clerk or secretary of the local board of health, or clerk of the board of supervisors; or from a volume printed by authority of the common council of the city or the board of trustees of the village or the local board of health of the city, town or village, or the board of supervisors." Copies of papers duly filed, and of records in the offices of certain clerks certified by such clerks with the seal of office, are evidence like the originals.[17] Promulgation of the ordinance need not be proved, unless specially required.[18] Posting of copies, when required, may be proved by parol, without producing the copies.[19] In the absence of anything

same municipality may judicially notice them. 1 Whart. Ev. 269, § 293.

The courts will not take judicial cognizance of ordinances. Rudison *v.* Glover, 131 La. 381, 59 So. Rep. 817; Coors *v.* Brock, 22 Colo. App. 470, 125 Pac. Rep. 599.

[15] 1 Dill. M. C. 443, § 355. And these, together with proof of the mayor's approval or other complete adoption, are sufficient, even in an action between third persons. Kennedy *v.* Newman, 1 Sandf. 187.

An original ordinance is admissible when identified by city clerk. People *v.* Smith, 201 Ill. 454, 66 N. E. Rep. 298.

An ordinance under the seal of a city is admissible without further proof. Eichenlaub *v.* St. Joseph, 113 Mo. 395, 21 S. W. Rep. 8, 18 L. R. A. 590.

[16] N. Y. Code Civ. Pro., § 941.

[17] Code Civ. Pro., §§ 933, 934.

[18] City Council *v.* Chur, 2 Bailey (S. C.), 164.

Where a city had for a long time acted upon an ordinance as if it were in full force and effect, such acquiescence affords presumptive evidence of due publication. Atchison *v.* King, 9 Kan. 550; Quincy *v.* Chicago, B. & Q. R. R. Co., 92 Ill. 21.

[19] Teft *v.* Size, 5 Gilm. (Ill.) 432.

In general, parol evidence as to the purpose for which a city ordinance was passed, is inadmissible. Amboy *v.* Illinois Cent.

to indicate the contrary, the court may presume an ordinance to have been regularly passed.[20] If the plaintiff's authority to sue depends upon the making or filing of a resolution or other document of a municipal body, the document itself, or a certified copy, with proof of execution and filing, is the primary evidence.[21] In prosecutions to enforce ordinances, the ordinary rules of evidence apply, except so far as specially modified by statute; and it is not competent for a municipal corporation, without express authority, to make or alter the rules of evidence or of law.[22]

7. Violation.

Plaintiff must show facts bringing the case clearly within the terms of the statute or ordinance,[23] reasonably construed.[24] The conditions upon which the penalty attaches must be affirmatively shown to have existed.[25] If the

R. R. Co., 236 Ill. 236, 86 N. E. Rep. 238.

[20] Buffalo Railroad *v.* Buffalo, 5 Hill, 209, 211. *Contra*, see Eldred *v.* Lehay, 31 Wis. 546.

Ordinances published by authority in book form are presumed to have been legally passed. Hancock *v.* McCarthy, 145 Iowa, 51, 123 N. W. Rep. 766; Pittsburgh, C. C. & St. L. Ry. Co. *v.* Rogers, 45 Ind. App. 230, 87 N. E. Rep. 28; McGregor *v.* Lovington, 48 Ill. App. 208; and such books constitute *prima facie* evidence of due enactment and publication. Moberly *v.* Deskin, 169 Mo. App. 672, 155 S. E. Rep. 842.

[21] Thompson *v.* Smith, 2 Den. 177.

[22] 1 Dill. M. C. 440, § 350.

[23] In illustration of this principal, see Allen *v.* Stevens, 29 N. J. L. (5 Dutch.) 509; Mayor, &c. of N. Y. *v.* Walker, 4 E. D. Smith, 258.

[24] Verona Cent. Cheese Factory *v.* Murtaugh, 50 N. Y. 314, 317, rev'g 4 Lans. 17.

A statute penal in its character should receive a strict rather than a liberal construction. People *v.* Rosenberg, 138 N. Y. 410, 34 N. E. Rep. 285. But the construction must be a reasonable one. Akers *v.* Mutual Life Ins. Co., 59 Misc. 273, 112 N. Y. Supp. 254.

[25] Comm's of Pilots *v.* Vanderbilt, 31 N. Y. 265.

A criminal complaint which merely sets out a municipal ordinance and alleges a violation thereof, but does not specify with reasonable certainty the acts charged is defective. State *v.* Swanson, 106 Minn. 288, 119 N. W. Rep. 45.

penalty is imposed for conduct or neglect in a particular capacity,—for instance, on a toll gatherer exacting tolls wrongfully,—evidence that defendant was acting in that capacity is *prima facie* sufficient.[26] Under an allegation that defendant did the act, evidence that he caused or procured it to be done is competent.[27]

8. Excepted Cases.

Where the language of the enacting clause prohibits the act, except under specified circumstances, the burden is on plaintiff to negative those circumstances,[28] unless they are peculiarly within defendant's knowledge.[29] Thus, the burden of showing that he had a license is on defendant.[30] Where the excepted cases are not actually incorporated into the enacting clause giving the action, but in a proviso or subsequent exemption, whether in the same [31] or subsequent sections, the burden is on defendant to bring himself within the exception.

[26] Trowbridge *v.* Baker, 1 Cow. 251, s. F., People *v.* Gilbert, Anth. N. P. 261. So evidence that defendant was master of a boat during the season, and on the day in question, is sufficient to go to the jury, in the absence of evidence to the contrary, to charge him with a penalty for racing. People *v.* Roe, 1 Hill, 470.

[27] Gaffney *v.* Colvill, 6 Hill, 567, 576, 580.

[28] Copley *v.* Burton, L. R. 5 C. P. 489, explained in Roberts *v.* Humphreys, L. R. 8 Q. B. 483, s. c., 7 Moak's Eng. 93.

[29] Compare Blann *v.* Beal, 5 Ala. 357; Medlock *v.* Brown, 4 Mo. 379; Conyers *v.* The State, 50 Geo. 103, s. c., 15 Am. Rep. 686. As to the effect of evidence that the defendant held himself out generally, without regard to the exception, see The Sunswick, 9 Ben. 112; People *v.* Kibler, 106 N. Y. 321, 12 N. E. Rep. 795; People *v.* Weldon, 111 N. Y. 569, 19 N. E. Rep. 279; People *v.* Briggs, 114 N. Y. 56, 20 N. E. Rep. 820; People *v.* Cannon, 139 N. Y. 32, 34 N. E. Rep. 759, 36 Am. St. Rep. 668.

[30] Potter *v.* Deyo, 19 Wend. 361; Mayor, &c. of N. Y. *v.* Mason, 4 E. D. Smith, 142, s. c., 1 Abb. Pr. 344; People *v.* Somme, 120 App. Div. 20, 104 N. Y. Supp. 946; People *v.* Grass, 79 Misc. 457, 141 N. Y. Supp. 204.

[31] Teel *v.* Fonda, 4 Johns. 304; People ex rel. Cook *v.* Board of Police, 16 Abb. Pr. 337; and the rule is the same, though the enacting clause contain a reference to

9. Knowledge of the Law.

Knowledge of the law is not presumed as a matter of fact;[32] but ignorance of it is relevant.[33]

10. Knowledge of Facts.

Whether it is necessary to prove that defendant knew the facts relevant to liability, depends on the language of the statute,[34] in connection with its general intent, and the nature of the fact.[35]

If a notice be required by the statute as preliminary to a penalty, it must be strictly proved; but if it is not the founda-

the subsequent exception. Hart *v.* Cleis, 8 Johns. 41.

[32] Black *v.* Ward, 27 Mich. 191, s. c., 15 Am. Rep. 162.

One is presumed to have knowledge of the Acts of Congress. Central Pac. Ry. Co. *v.* Droge, 171 Cal. 32, 151 Pac. Rep. 663.

If the defendant had presumptive, although not actual knowledge of the law, he is bound thereby. People *v.* Klock, 55 Misc. 46, 106 N. Y. Supp. 267.

The presumption that every man knows the law, does not hold him to a knowledge of statutes which for any reason are illegal or void. King Tonopah Mining Co. *v.* Lynch, 232 Fed. Rep. 485.

[33] Hyde *v.* Melvin, 11 Johns. 521. Misapprehension of it is equally irrelevant. Sherman *v.* Spencer, 1 N. Y. Leg. Obs. 172. Hence even the opinion of a public officer, expressed at the time of the act, that it was not a violation, is incompetent. Fire Department *v.* Buhler, 35 N. Y. 177, s. c., 33 How. Pr. 378, rev'g 1 Daly, 391. So of the command of a superior officer. Hyde *v.* Melvin, 11 Johns. 521; Duluth *v.* Mallet, 43 Minn. 204, 45 N. W. Rep. 154.

[34] Verona Cent. Cheese Fact. *v.* Murtaugh, 50 N. Y. 314; Bayard *v.* Smith, 17 Wend. 88, 90; Gaffney *v.* Colvill, 6 Hill, 567, 576; Nichols *v.* Hall, L. R. 8 C. P. 322, s. c., 5 Moak's Eng. 300; Fitzpatrick *v.* Kelly, L. R. 8 Q. B. 337, s. c., 6 Moak's Eng. 94; Roberts *v.* Humphreys, L. R. 8 Q. B. 483, s. c., 7 Moak's Eng. 93.

[35] Hassenfrats *v.* Kelly, 13 Johns. 466, 468; Etheridge *v.* Cromwell, 8 Wend. 629.

Where the manifest purpose of a statute is to impose upon the owner the absolute duty of keeping his premises in the manner prescribed by the statute, and they are not so kept, he cannot escape liability by showing that he was ignorant of the fact or that his employee caused the unlawful conditions without his knowledge or consent. People *v.* D'Antonio, 150 App. Div. 109, 134 N. Y. Supp. 657.

tion of the action, and merely relates to some collateral fact, its contents may be proven by parol.[36]

11. Knowing or Intentional Violation.

If the statute forbids the doing of the act knowingly, or with intent, or for the purpose, etc., or the like, there must be some evidence tending to show knowledge or intent.[37] Where the penalty is in the nature of an indemnity for fraud, knowledge of one partner, or an agent or servant, may be proved against the other, or the principal,[38] if he retains the fruit of the transaction.[39] If there is evidence of habitual or repeated acts, knowledge in the particular one is not essential.[40] It is sufficient to prove knowledge that his servants or agents violated the act; and a general authority to do acts in violation is enough, but not conclusive.[41] The person who did the act may, as a witness, testify to his intent.[42] He may be

[36] McFadden *v.* Kingsbury, 11 Wend. 667. Thus, in an action for disobeying a subpœna, the writ, if in plaintiff's possession, is the primary evidence, and cannot be proved by defendant's admissions. Hasbrouck *v.* Baker, 10 Johns. 248. But his non-attendance may be proved by parol. Cogswell *v.* Meech, 12 Wend. 147. If the law requires a notice the terms of which must be judicially fixed by a board of officers, evidence of a notice by their president merely, is not enough, though they referred it to him to give notice. Comm'rs of Pilots *v.* Vanderbilt, 31 N. Y. 265, affi'g 2 Robt. 367.

[37] Verona Cent. Cheese Fact. *v.* Murtaugh (below); and see Davies *v.* Harvey, L. R. 9 Q. B. 433, s. c., 9 Moak, 367. Compare Chesley *v.* Brown, 11 Me. (2 Fairf.) 143. The intent must be proved beyond a reasonable doubt. State *v.* Sparks, 79 Neb. 511, 114 N. W. Rep. 598.

[38] Davies *v.* Harvey (above). One who keeps an office where purchases of stock are made without delivery being intended, is presumed to have knowledge of such fact. Soby *v.* People, 134 Ill. 66, 25 N. E. Rep. 109; Weare Commission Co. *v.* Ill., 209 Ill. 528, 70 N. E. Rep. 1076.

[39] Stockwell *v.* U. S., 13 Wall. 531. In other penal actions such imputation of knowledge is not generally allowable. Id. 563.

[40] Verona Cent. Cheese Fact. *v.* Murtaugh, 50 N. Y. 314, 316, 318, rev'g 4 Lans. 17.

[41] Id., and cases cited.

[42] Supt. of Cortland *v.* Supt. of Herkimer, 44 N. Y. 22.

asked whether he did the act in good faith,[43] or whether he supposed he was violating the statute.[44]

Other similar violations he committed during the same period, especially if in the same business and premises, are competent, and, in the absence of other evidence, are *prima facie* evidence of intent.[45] Acts in a different season and circumstances, not affording reasonable presumption of similar result, are not competent.[46]

12. Admissions and Declarations.

The admissions or declarations of the defendant's agent or servant are not competent against defendant.[47] In the case of several defendants, the admissions and declarations of one are competent against himself, but not necessarily against the other.[48] Where several offenses are charged, a general admission of having committed offenses, not showing what offense, and to what penalty the defendant intends the admission to apply, is not enough.[49]

13. Character.

Character is not in issue.[50]

14. Cogency of Proof.

A private action for penalty does not require proof beyond

[43] Id., see also chapter XXXIV, paragraphs 8 and 12 of this vol.

[44] Stearns *v.* Ingraham, 1 Supm. Ct. (T. & C.) 218, see also Chapter LIX.

[45] Lilienthal's Tobacco *v.* U. S., 97 U. S. (7 Otto) 237, 267.

Where it is necessary to show a particular intent in order to establish the offense charged, proof of previous acts of the same kind is admissible for the purpose of proving guilty knowledge or intent. People *v.* Seaman, 107 Mich. 348, 65 N. W. Rep. 203, 61 Am. St. Rep. 326.

[46] Stearns *v.* Ingraham (above).

[47] Clay *v.* Swett, 4 Bibb (Ky.), 255. Unless part of the *res gestæ*, or made within the scope of authority. See Chapter III, paragraph 51 of this vol.

[48] Compare rules stated in chapter I, paragraph 27, etc., and chapter XLVIII, paragraph 30 of this vol., and Aiken *v.* Peck, 22 Vt. 255; Nichols *v.* Hotchkiss, 2 Day (Conn.), 121.

[49] Mayor, &c. of N. Y. *v.* Walker, 4 E. D. Smith, 258.

[50] 1 Whart. Ev. 63, § 47, citing Atty.-Gen. *v.* Bowman, 2 B. & P. 53, n. a.

reasonable doubt; [51] otherwise of an action by the government for a penalty.[52]

15. Obstructing Highways.

To entitle plaintiff to a verdict, it is sufficient to prove a highway *de facto*, by evidence that the obstruction complained of was placed in a road which had been traveled by the public as a highway more than six years before the time of the trial, and more than a year before it was fenced up; [53] and that, while it was being so used, it was obstructed by defendant. This entitles him to a verdict.[54]

Under plea of title, defendant may give in evidence his title deeds, or show himself in possession of the adjacent land, and then rest.[55]

The burden is then thrown on plaintiff to prove that the alleged highway has been duly laid out by the commissioner, or that it is a highway by dedication or twenty years' use.[56] If he produces the record of the establishment of the road as a public highway, and proves that it was opened and used,

[51] Hitchcock *v.* Munger, 15 N. H. 97. *Contra*, White *v.* Comstock, 6 Vt. 405.

[52] Chaffee *v.* U. S., 18 Wall. 516, 545. Compare paragraph 44, and chapter XXVI, paragraph 31 of this vol.

In an action by the government to recover a penalty, it is not necessary that the evidence establish a violation beyond a reasonable doubt; a reasonable preponderance of proof is sufficient. U. S. *v.* Regan, 232 U. S. 37, 34 S. Ct. 213, 58 L. ed. 494.

To the same effect see Coffey *v.* U. S., 116 U. S. 436, 6 S. Ct. 437, 29 L. ed. 684.

[53] Little *v.* Denn, 34 N. Y. 452. But in applying this rule, the statutes in force at the time should be consulted. See also, as to dedication, cases collected in 2 Abb. New Cas. 400, note.

When it is shown that the defendant maintains obstructions in the public highway, and the town neglects to perform its duty to proceed for the abatement of the nuisance, the state may employ its visitorial power for the correction of the abuse. State *v.* Franklin, 133 Mo. App. 486, 113 S. W. Rep. 652.

[54] Little *v.* Denn (above).

[55] Id.

[56] Little *v.* Denn, 34 N. Y. 452. In a justice's court, defendant cannot show that he is owner of the fee, not having actual possession of the *locus in quo*. That a road has been maintained by the town

he need not prove all the proceedings preliminary to the laying out of the road.[57] It is for defendant to show them irregular.[58]

16. Selling Liquors.

The overseers of the poor suing for a penalty under the liquor laws, may prove their character by general reputation.[59] Plaintiff may make a *prima facie* case of sale, by circumstantial evidence.[60] Evidence of keeping as for sale is competent on the question of sale.[61] So is the fact of keeping a bar with bottles in it,[62] and the fact that it was a place of resort, and that persons went in sober and came out drunk.[63] The presence of *indicia* of the business—decanters, glasses, pitchers, beer-pump, etc.,—is competent evidence,[64]

is evidence that it is a public highway. Brown *v.* Town of Swanton, 69 Vt. 53, 37 Atl. Rep. 280.

[57] Sage *v.* Barnes, 9 Johns. 365.

[58] Chapman *v.* Gates, 46 Barb. 313, 320.

[59] Blatchley *v.* Moser, 15 Wend. 215, 218.

In an action against a defendant for selling intoxicating liquors, his conviction of other crimes may be shown, but it is not proper to compel him to give evidence of his own guilt. State *v.* Knight, 106 Minn. 371, 119 N. W. Rep. 56.

[60] People *v.* Hulbert, 4 Den. 133, 137; State *v.* O'Conner, 49 Me. 594; State *v.* Hynes, 66 Me. 114; Commonw. *v.* Cotter, 97 Mass. 336.

Evidence as to illegal sale may be shown by wholly unexplained facts tending to prove it. Pierce *v.* State, 109 Ind. 535, 10 N. E. Rep. 302.

[61] State *v.* Wentworth, 65 Me. 234; Com. *v.* Tate, 178 Mass. 121, 59 N. E. Rep. 646.

[62] People *v.* Hulbert, 4 Den. 133, 137; Vallance *v.* Everts, 3 Barb. 553; Commonw. *v.* Jennings, 107 Mass. 488; Com. *v.* Lufkin, 167 Mass. 553, 46 N. E. Rep. 109.

[63] Commonw. *v.* Stone, 97 Mass. 548; Commonw. *v.* Kennedy, Id. 224; Com. *v.* Lufkin, 167 Mass. 553, 46 N. E. Rep. 109.

In a criminal prosecution for selling liquor to one in the habit of getting intoxicated, it is competent to permit witnesses to testify directly as to the habit of the person in question in respect to the uses of intoxicating liquors. Sheppelman *v.* People, 134 Ill. App. 556.

[64] Commonw. *v.* Lamere, 11 Gray, 319.

The finding of intoxicating liquors in a public resort, or of unusual quantities thereof in a private dwelling in the possession of one not legally authorized to sell or use the same is presumptive evidence that such liquors are kept

and the names of liquors marked on the vessels may be proved without producing the vessels or labels.[65] The fact that defendant kept a tavern and displayed an innkeeper's sign, is not alone relevant on the question of sale,[66] but there being other evidence of sale, the existence of and inscription on his sign is competent to show his business and identity.[67] So is his business card,[68] and cards attached to jugs, etc., on his premises.[69] Evidence of the moving of liquor casks,[70] and of having empty vessels which recently contained intoxicating liquors,[71] is competent.

An ordinary witness may testify directly that a liquor was gin, brandy, or other. It does not require an expert.[72] The name by which a beverage was called for or served, is also competent evidence.[73]

for illegal sale. State *v.* Wilson, 152 Iowa, 529, 132 N. W. Rep. 820.

[65] Commonw. *v.* Blood, 11 Gray, 74.

In a trial for violating a local option law, it was not error to admit testimony that the bottle received by the witness was labeled "Budweiser." Coleman *v.* State, 112 S. W. Rep. (Tex.) 769.

[66] Commonw. *v.* Madden, 1 Gray, 486.

[67] State *v.* Wilson, 5 R. I. 291.

[68] Commonw. *v.* Twombly, 119 Mass. 104.

[69] Commow. *v.* Dearborn, 109 Mass. 368.

Evidence that U. S. Revenue Stamps were on beer kegs, is competent as showing that the kegs contained malt liquor. State *v.* Wright, 68 N. H. 351, 44 Atl. Rep. 519.

[70] Commonw. *v.* Davenport, 2 Allen, 299.

[71] Commonw. *v.* Timothy, 8 Gray, 480; State *v.* Baskins, 82 Iowa, 761, 48 N. W. Rep. 809; Craig *v.* State, 9 Ga. App. 233, 70 S. E. Rep. 974.

[72] Commonw. *v.* Timothy (above).

In a criminal prosecution for selling liquor without a license, it was held that the jury might inspect the contents of a bottle which has been properly identified. Reed *v.* Territory, 1 Okl. Cr. 481, 98 Pac. Rep. 583, 129 Am. St. Rep. 861.

[73] Testimony that in a business house one of a party called for whiskey, and that some liquid in a bottle was set out to them by the proprietor, of which they drank, is sufficient to go to the jury as evidence of a sale of whiskey. State *v.* Jarrett, 35 Mo. 357.

Where a beverage sold under a trade name is claimed to be intoxicating, evidence of its effects when sold in other places is admissible. State *v.* Clark, 124 La. 965, 50 So. 811.

Sale of liquor by a servant is *prima facie* evidence of sale by the master.[74] Evidence of the precise day of committing the offense is not essential.[75] Sales, and seizures, made a short time prior to the day pleaded, are competent evidence tending to prove that the keeping on the day named was with intent to sell, etc. [76]

IV. ACTIONS (UNDER CIVIL DAMAGE LAW) FOR CAUSING INTOXICATION

17. Ground of Action.

The action is given by statute; [77] and a case clearly within the terms of the statute must be shown.[78] But this rule does not require any peculiar cogency of proof, but only that every element implied in the statute must be supported by preponderance of evidence.[79] The "cause of action" is not the

[74] State *v.* Wentworth, 65 Me. 234.

[75] Tiffany *v.* Driggs, 13 Johns. 253. But the place may be essential. Andrews *v.* Harrington, 19 Barb. 343, 346.

[76] Commonw. *v.* Stoehr, 109 Mass. 365.

"When it is necessary to show a particular intent in order to establish the offense charged, proof of previous acts of the same kind is admissible for the purpose of proving guilty knowledge or intent. People *v.* Bullock, 173 Mich. 397, 139 N. W. Rep. 43.

[77] Compare Hoard *v.* Peck, 56 Barb. 202.

The Civil Damage Act (Laws of N. Y. 1873, ch. 646) which provided for an action against those causing intoxication, is not a penal statute but simply creates a cause of action for damages which was unknown to the common law. Quinlan *v.* Welch, 141 N. Y. 158, 36 N. E. Rep. 12.

But see Schulte *v.* Schleeper, 210 Ill. 357, 71 N. E. Rep. 325, holding that the Illinois dram-shop act is highly penal in its character, since it provides remedies unknown to the common law. It should therefore be strictly construed.

The action of a husband, wife, parent, child, guardian or employer of a person who is addicted to drink, to recover, under Pub. St. ch. 100, § 25, a limited sum from one who continues to sell intoxicants to such drinking person, after notice in writing not to do so, is essentially a penal action. Common law rules cannot be in all respects applied. Sackett *v.* Ruder, 152 Mass. 397, 25 N. E. Rep. 736, 9 L. R. A. 391.

[78] Brannan *v.* Adams, 76 Ill. 321.

[79] Hall *v.* Barnes, 82 Ill. 228;

tort committed by the intoxicated person; it is the furnishing of intoxicating liquor [80] to a person capable of its abuse and actually abusing it to the damage of the plaintiff in person, property, or means of support. The tort, if any, committed by the intoxicated person is referred to for the purpose of establishing the fact of damages and proving their amount. Injuries of all the three kinds constitute but one cause of action.[81]

18. Order of Proof.

The order of proof is, as usual, in the discretion of the judge.[82]

Mead *v.* Stratton, 8 Hun, 148; and see Bodge *v.* Hughes, 53 N. H. 614. In Ohio it has been held that the sale, being there a criminal offense, must be proved beyond a reasonable doubt. Mason *v.* Shay, 3 Am. L. Rec. 435, affi'g 1 Id. 553. Compare Chapter XXVI, paragraph 31 of this vol.

Where the statute provided that the principal and sureties on the seller's bond should be liable severally and jointly with the person or persons so selling and where it appeared that various sales made during three separate years had caused plaintiff's injury, the principal and sureties on the bonds for each of the successive years were liable. Merrinane *v.* Miller, 157 Mich. 279, 118 N. W. Rep. 11, 25 L. R. A. 585.

[80] Volans *v.* Owen, 74 N. Y. 526, 529; Mulford *v.* Clewell, 21 Ohio St. 191; s. p., Emory *v.* Addis, 71 Ill. 273; Hackett *v.* Smelsley, 77 Id. 109. *Contra*, Jackson *v.* Brookins, 5 Hun, 530.

The civil law imposes damages only for the natural and probable consequences resulting from the furnishing or sale of intoxicating liquors. Roach *v.* Kelly, 194 Pa. 24, 44 Atl. Rep. 1090, 75 Am. St. Rep. 685.

It must be shown that the intoxication of the person causing the injury was the proximate cause of the injury. Currier *v.* McKee, 99 Me. 364, 59 Atl. Rep. 442, 3 Ann. Cas. 57; Schulte *v.* Schleeper, 210 Ill. 357, 71 N. E. Rep. 325.

[81] Schneider *v.* Hosier, 1 Oh. St. 98.

To charge a party, "the furnishing the liquor by him must be in whole or in part, the proximate cause of the intoxication to which the injury complained of may be imputable. And for that purpose the liquor must be furnished, by such party to or for the person whose intoxication is the foundation of the charge of liability for the injury." Dudley *v.* Parker, 132 N. Y. 386, 30 N. E. Rep. 737.

[82] See Woolheather *v.* Risley, 38

19. Relation of Plaintiff to the Drunkard.

The modes of proving marriage,[83] or the right to service of children,[84] have already been stated. An employer need not prove a permanent relation, such as apprenticeship. Intoxication of ordinary hired laborers, with damage by the stoppage of their work, is enough.[85]

20. Sale or Gift of Liquor.

Where the statute applies to sales and gifts, either a sale or a gift may be proved under an allegation that defendant sold and gave.[86] Under a statute which refers only to sales, proof of a gift will not sustain the action.[87] But the allegation of a sale in such case may be proven by evidence of a sale on credit,[88] or in exchange for services,[89] or furnishing as

Iowa, 486; Hall *v.* Barnes, 82 Ill. 228.

[83] Chapter V, paragraph 14 of this vol. Defendant may disprove the marriage by evidence of the existence of a prior husband or wife (Emerson *v.* Shaw, 56 N. H. 418, s. c., 1 Law & Eq. R. 635), and in such case the plaintiff can only recover for such injury to person or property as a stranger could, and not for loss of means of support. Kearney *v.* Fitzgerald, 43 Iowa, 580, s. c., 10 West. Jur. 553.

[84] Chapter XIX, paragraph 39 of this vol.

A mother may maintain an action for causing her minor son's intoxication, even though the father is living. Ellsworth *v.* Cummins, 134 Ill. App. 397.

[85] Duroy *v.* Blinn, 11 Ohio St. 331.

[86] See State *v.* Brown, 36 Vt. 560; State *v.* Irvine, 3 Heisk. (Tenn.) 155; State *v.* Finan, 10 Iowa, 19. The terms of the act, it was noticed in Dubois *v.* Miller, 5 Hun, 335, apply as well to him who sells a barrel as to him who sells a glass. But query? unless known to be bought for consumption of buyer. See paragraphs 25 and 27 below.

[87] Brannan *v.* Adams, 76 Ill. 331. But where the statute refers to "furnishing," proof of a gift is enough. State *v.* Freeman, 27 Vt. 520. The defendant's declaration, a day or two after the drinking, that he had not charged and would not take pay, is not competent. State *v.* Greenleaf, 31 Me. 517.

[88] See Horn *v.* Smith, 77 Ill. 381; Riley *v.* State, 43 Miss. 397; Emerson *v.* Noble, 32 Me. 380.

A sale on credit is a complete sale. Cook *v.* State, 124 Ga. 653, 53 S. E. Rep. 104.

[89] See Horn *v.* Smith (above); State *v.* Bescher, 32 Ind. 480.

Giving whiskey to pay for use of

stakes of a game with the seller.[90] So giving away to promote custom,[91] or selling a cigar and throwing in a drink,[92] may be found by the jury to amount to a sale. But proof that the drinker wrongfully took the liquor, and the defendant, on discovering the tort, compelled him to pay for it, does not establish a sale.[93] The fact that the liquor was paid for by another person than the one to whom it was furnished, and who became intoxicated, is not material.[94] Proof that defendant refused to sell to the drinker on one occasion, is not evidence that he did not sell at another.[95]

21. Liability of Salesman.

The mere salesman is liable, without proof that he had any interest in the liquor or the business.[96]

a buggy is a sale. Paschal *v.* State, 84 Ga. 326, 10 S. E. Rep. 821.

[90] Commonw. *v.* Hogan, 97 Mass. 120.

A saloon-keeper is liable whether or not he had a promise or expectation of being paid. Hilliker *v.* Farr, 149 Mich. 444, 112 N. W. Rep. 1116.

[91] Kober *v.* State, 10 Ohio St. 444.

Where one gives away whiskey to his customers, it is a question of fact for the jury whether he does so for the purpose of influencing trade. Meadows *v.* State, 121 Ga. 362, 49 S. E. Rep. 268.

[92] State *v.* Decker, 10 West. L. J. 328.

The administering of spirits by a physician to a patient is not a sale. Shaffner *v.* State, 8 Ohio St. 642.

Whether the sale of a lunch in connection with the purported gift of liquor was a sale of the liquor is a question for the jury. Savage *v.* State, 50 Tex. Cr. R. 199, 88 S. W. Rep. 351.

[93] Kreiter *v.* Nichols, 28 Mich. 490.

[94] Volans *v.* Owen, 9 Hun, 558; Commonw. *v.* Very, 12 Gray, 124; and see State *v.* Munson, 25 Ohio St. 381; but compare Boyd *v.* Watt, 27 Ohio St. 259.

Proof that the liquor which caused the intoxication was paid for by others who treated the person in question is sufficient. Johnson *v.* Gram, 72 Ill. App. 676.

Proof of having furnished the intoxicating liquor upon the order and promise of payment by a third person is sufficient. Judge *v.* Jordan, 81 Iowa, 519, 46 N. W. Rep. 1077.

[95] Commonw. *v.* Barlow, 97 Mass. 597.

Proof by several witnesses that

[96] Worley *v.* Spurgeon, 38 Iowa, 465; Barnaby *v.* Wood, 50 Ind. 405; S. P., in penal action, Roberts *v.* O'Conor, 33 Me. 496; and in

22. Liability of Principal.

Under an allegation that the defendant sold, etc., it is competent to prove a sale by his subordinate;[97] and if there be evidence that the subordinate acted by his authority, defendant is liable;[98] and his liability in actual damages is not removed by evidence that the sale in this case was without his knowledge and contrary to his express instructions.[99] Evidence that the salesman was in the place and garb of a clerk or servant,[1] or was the son, or husband, or wife of the

the defendant in their presence refused to sell liquor to the deceased, does not warrant the conclusive inference that sales were not made by him upon other and distinct occasions. Lawson *v.* Eggleston, 28 App. Div. 52, 52 N. Y. Supp. 181; affi'd 164 N. Y. 600; 59 N. E. Rep. 1124.

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criminal prosecutions, State *v.* Finan, 10 Iowa, 19; and see 4 Allen (Mass.), 587. As to liquor furnished at a club, see Marmont *v.* State, 48 Ind. 21, and cases cited; State *v.* Mercer, 32 Iowa, 405.

[97] See Parker *v.* State, 4 Ohio St. 563; State *v.* Stewart, 31 Me. 515; State *v.* Brown, Id. 520.

Sales made by the defendant's clerk, bartender, agent, or servant, are deemed in law to have been made by him and he is presumed to have had knowledge thereof. Pennington *v.* Gillaspie, 63 W. Va. 541, 61 S. E. Rep. 416.

[98] Peterson *v.* Knoble, 35 Wis. 80; S. P., Comm'rs of Excise *v.* Dougherty, 55 Barb. 332. Permitting, not enough. Ditton *v.* Morgan, 56 Ind. 60.

If any person whether regularly employed as clerk, agent or servant, or not, goes into a saloon and sells or gives away intoxicating liquors with the knowledge and consent of the owner or keeper, or with his subsequent ratification thereof, such owner or keeper must be held responsible for these acts and such person will be treated as as his agent in making the sale or sales. Kennedy *v.* Sullivan, 34 Ill. App. 46 affi'd 136 Ill. 94, 26 N. E. Rep. 382).

[99] Kreiter *v.* Nichols, 28 Mich. 498; Smith *v.* Reynolds, 8 Hun, 128; Keedy *v.* Howe, 72 Ill. 133.

The master cannot exonerate himself by showing that the sales were made by employees in violation of his specific instructions. Cullinan *v.* Burkard, 93 App. Div. 31, 86 N. Y. Supp. 1003; People *v.* Clement, 134 App. Div. 462, 119 N. Y. Supp. 374. But see Berger *v.* Wilcox, 84 Neb. 128, 120 N. W. Rep. 960.

[1] See 50 N. Y. 214, 66 Barb. 338, 36 Super. Ct. (4 J. & S.) 222.

defendant, is competent, but not alone sufficient,[2] to show his agency.

23. Connecting Defendant with Salesman.

The fact that the salesman was defendant's authorized subordinate, may be proved, like any other agency, or by proving other sales of liquor made by him or her, to other persons in the presence of defendant,[3] or of defendant's partner or authorized agent in the business.

24. Connecting Defendant with Business.

On the question whether defendant had any interest in the business, it is competent to prove circumstances shown or presumable to be within his knowledge, indicating the manner in which the business was conducted, and under what name and style.[4] Upon this principle, the inscription of defendant's name on a sign-board on or in the bar room,[5] may be proved by a witness; and the license or the application for it, and the labels bearing defendant's name on the jugs, etc., in the place,[6] are competent.

[2] The contrary has been held even in a criminal prosecution. State *v.* Brown, 31 Me. 520. I consider the rule in Parker *v.* State, 4 Ohio St. 565, sound. That the fact that the salesman was the defendant's son, is not enough without evidence of authority. But where the sale was by defendant's wife, the fact that they lived together, the place being his, and there being no evidence that she carried on a separate trade, was held sufficient evidence of her agency to sustain a verdict against him. Common. *v.* Coughlin, 14 Gray (Mass.), 389. Such evidence, conversely, might not prove the husband to be the agent of his wife. Mead *v.* Stratton, 8 Hun, 148.

[3] Hall *v.* McKecknie, 22 Barb. 244; S. P., State *v.* Roberts, 55 N. H. 483, 485, and cases cited.

It must appear that the sale was made by the defendant in person or in his presence and with his consent. Fowler *v.* Rome Dispensary, 5 Ga. App. 36, 62 S. E. Rep. 660.

[4] REDFIELD, J., Blanchard *v.* Manahan, 44 Vt. 251.

[5] State *v.* Wilson, 5 R. I. 291.

[6] Common. *v.* Dearborn, 109 Mass. 368, and see chapter XXXI, paragraph 24 of this vol. The sign-board or jugs need not be produced. Paragraph 16 of this chapter.

It is competent to show that the defendant applied for and obtained a license for the purpose of

25. Connecting Sale with Intoxication.

It must appear that the defendant's furnishing of liquor was to the person thereby intoxicated.[7] Evidence that he entered the saloon sober, and was found there, or came out, intoxicated, would be competent, at least in the absence of direct testimony, but not alone sufficient proof of the furnishing of liquor causing intoxication.[8] An allegation of causing intoxication, admits evidence of causing it in part.[9]

If the drinker or any other witness testifies to a sale at defendant's saloon, it is competent to prove by cross-examination or otherwise that the witness previously drank elsewhere, not for the purpose of contradicting him,[10] nor, if his own intoxication did the injury, to reduce the damages; but to impair his credit.

26. Character of Liquor.

A witness may testify directly to the intoxicating quality of a beverage,[11] or the court may take judicial notice of it; [12]

identifying him as the keeper of the premises. Com. *v.* Sullivan, 156 Mass. 229, 30 N. E. Rep. 1023.

[7] Bush *v.* Murray, 66 Me. 472.

If specific acts of intoxication are proved and the defendant denies having made any sales, evidence of contemporaneous sales by others to the persons for causing whose intoxication the action is brought, is admissible. Liebler *v.* Carrel, 155 Mich. 196, 118 N. W. Rep. 975.

[8] Curran *v.* Percival, 21 Neb. 434, 32 N. W. Rep. 213; Kearney *v.* Fitzgerald, 43 Iowa, 580, s. c., 10 West. Jur. 555; Commonw. *v.* Kennedy, 97 Mass. 224. Declarations of intent to go to defendant's saloon, may be competent. Rafferty *v.* Buckman, 46 Iowa, 195.

[9] Roth *v.* Eppy, 80 Ill. 283; Lawson *v.* Eggleston, 28 App. Div. 52, 52 N. Y. Supp. 181 aff'd 164 N. Y. 600, 59 N. E. Rep. 1124.

[10] Common. *v.* Fitzgerald, 2 Allen, 297.

[11] Paragraph 16 of this chapter. State *v.* Henry, 74 W. Va. 72, 81 S. E. Rep. 569.

The intoxicating character of liquor, though called grape juice, is sufficiently shown by the testimony of a minor that he drank two quarts of it and that it made him drunk. Askew *v.* State, 4 Ga. App. 446, 61 S. E. Rep. 737.

[12] So held of gin. Commonw. *v.* Peckham, 2 Gray, 514. So held of whiskey. United States *v.* Ash, 75 Fed. Rep. 651. As to beer, see Blatz *v.* Rohrboch, 116 N. Y. 450; Bell *v.* State, 91 Ga. 227. As to wine, see Worley *v.* Spurgeon, 38 Iowa, 465. The court will not take

and where they do not do so, there must be some evidence on the point,[13] and the question is for the jury.

27. Knowledge and Intent of Seller.

It is not necessary to prove that the seller had in fact any mischievous intent, or anticipated causing intoxication,[14] or even that he knew the liquor to be intoxicating,[15] unless the act makes knowledge material.

If the act requires proof of known intemperate habits, evidence of general reputation is not enough,[16] at least without such circumstances of proximity,[17] or of long continued sales by defendant,[18] as to raise a presumption that he had

judicial notice, whether one would recover from intoxication in five or six hours. Brannan *v.* Adams, 76 Ill. 331.

"The court takes judicial notice of the fact that wine is an intoxicating liquor." Wolf *v.* State, 59 Ark. 297, 27 S. W. Rep. 77, 43 Am. St. Rep. 34.

"Whiskey, porter and ale are taken to be intoxicating liquors." State *v.* Barr, 84 Vt. 38, 77 Atl. Rep. 914, 48 L. R. A. N. S. 302.

[13] See Schlosser *v.* State, 55 Ind. 82.

Testimony of a witness that a man was furnished with a glass containing liquor that looked like beer, and that he paid for it and immediately thereafter was very much intoxicated, is evidence tending to show that intoxicating liquor had been sold him. Wilson *v.* Booth, 57 Mich. 249, 23 N. W. Rep. 799.

[14] Barnaby *v.* Wood, 50 Ind. 405.

Where it appears that the plaintiff revoked the notice not to sell liquor to her husband, evidence as to the defendant's opinion of the legality and efficacy of such revocation or as to the plaintiff's motive in making the revocation is inadmissible. Farenthold *v.* Tell, 52 Tex. Civ. A. 110, 113 S. W. Rep. 635.

[15] The contrary was held in a criminal prosecution in State *v.* Chambers, 4 West. L. Monthly, 275; but see paragraphs 13 (above) and 37 (below).

[16] Stanley *v.* State, 26 Ala. 26, GOLDTHWAITE, J.

[17] Adams *v.* State, 25 Ohio St. 586, and see Smith *v.* State, 19 Conn. 493.

[18] Wickwire *v.* State, 19 Conn. 477.

Proof that the deceased on former occasions drank at the defendant's place and to the latter's knowledge had protracted sprees, is competent upon the question of damages. Lawson *v.* Eggleston, 28 App. Div. 52, 52 N. Y. Supp. 181; aff'd 164 N. Y. 600, 59 N. E. Rep. 1124.

notice of the habit. Intemperate habit is a question of fact, and a witness may be allowed to state that the drinker was of such habit,[19] subject, of course, to cross-examination as to the grounds of this statement.[20]

Where the liability sought to be enforced is affixed by the act to a sale to a minor, and the act makes knowledge of minority material, evidence of the fact of minority, and of circumstances sufficient to put the seller on inquiry, is *prima facie* sufficient; and it is not a sufficient answer to show merely that the buyer had a beard, and represented that he was of age.[21]

28. Fact of Intoxication.

Any witness, though he be not an expert, who saw the alleged drinker, may be asked whether or not he was, in the witness' judgment, intoxicated or drunk; or under the influence of liquor. It does not render the evidence incompe-

[19] Stanley *v.* State (above).

But such evidence is not admissible for the purpose of forming a basis for the allowance of punitive damages. Smith *v.* People, 141 Ill. 447, 31 N. E. Rep. 425.

[20] Paragraph 16 of this chapter.

[21] Goetz *v.* State, 41 Ind. 162. There is difference of opinion whether knowledge of the minority or the habit is material unless made so by the act. In Jamison *v.* Burton, 43 Iowa, 282, s. c., 10 West. Jur. 505, it was held not material, and this is the better opinion. In Massachusetts it is not material, even in a criminal prosecution. See paragraph 37 (below). In Indiana it is material, but is presumed, and may be rebutted by satisfactory proof of reasonable belief, entertained in good faith, that the buyer was a minor, &c. Farrell *v.* State, 45 Ind. 371, and cases cited. See, on the general principle that ignorance of a constituent fact does not necessarily take away criminality, Halstead *v.* State, 10 Cent. L. J. 290; and paragraph 10 (above); Reg. *v.* Prince, L. R. 2 C. Cas. R. 154, s. c., 13 Eng. R. 385.

The sale of liquor to minors is a violation of the law without reference to knowledge of the infancy of buyer. Sowles *v.* Martens, 160 Iowa, 580, 142 N. W. Rep. 442.

Statements by the alleged minor when he purchased liquor, that he was not under age, are admissible to impeach him as a witness, but are not substantive evidence. Fielding *v.* La Grange, 104 Iowa, 530, 73 N. W. Rep. 1038.

tent that the witness is unable to state all the constituent facts which amount to drunkenness.[22]

29. Liability of Owner and Lessor.

Proof of a lease of the premises made by a person sought to be charged as owner, raises a presumption of ownership.[23] Knowledge of the use of the premises for sale of liquor is not necessarily inferred, even from joint occupation.[24] Without some evidence tending to show knowledge, the owner cannot be held merely as owner.[25] Evidence of common notoriety is not alone competent evidence of his knowledge.[26]

30. Contributory Negligence.

It has been held that if the intoxication was produced in

[22] People *v.* Eastwood, 14 N. Y. 562, affi'g 3 Park Cr. 25, s. p., McKee *v.* Nelson, 4 Cow. 355. "State whether or not your husband was intoxicated," &c., held not improper as leading. Woolheather *v.* Risley, 38 Iowa, 486. On the question whether one was intoxicated several hours after drinking, evidence as to how long it usually takes for a person to get sober, was held competent in Brannon *v.* Adams, 76 Ill. 331.

Nonexpert witnesses may testify whether or not a person was intoxicated. Edwards *v.* Worcester, 172 Mass. 104, 52 N. E. Rep. 447.

A witness may testify that in his best judgment the person who caused the injury was intoxicated at the time of accident. Quinn *v.* O'Keefe, 9 App. Div. 68, 41 N. Y. Supp. 116.

[23] See chapter XXXI, paragraph 23, and chapter XXXVIII, paragraph 4 of this vol.

An owner may not escape liability on the ground that he had no actual knowledge where the agent who let the premises for him knew that they were to be used for the sale of liquor. Hall *v.* Germain, 131 N. Y. 536, 30 N. E. Rep. 591.

[24] Mead *v.* Stratton, 8 Hun, 148; Cobleigh *v.* McBride, 45 Iowa, 116.

[25] Barnaby *v.* Wood, 50 Ind. 405.

Letting after the statute took effect, with knowledge of the lessee's purpose, is evidence of permission. See Granger *v.* Knipper, 2 Cinn. 480, and see State *v.* Shanahan, 54 N. H. 437; State *v.* Ballingall, 42 Iowa, 87, s. c., 10 West. Jur. 24.

Where the husband of the owner of the premises collected the rents and looked after the property for her, she was chargeable with notice of the sale of intoxicating liquor upon said premises contrary to law. Johnson *v.* Grimminger, 83 Iowa, 10, 48 N. W. Rep. 1052.

[26] Cobleigh *v.* McBride (above), and see paragraph 27. Compare

part by plaintiff's procurement,[27] or would have been wholly prevented by reasonable care which plaintiff might have exerted without danger,[28] there can be no recovery; but, on the other hand, if plaintiff was in nowise chargeable with responsibility for the intoxication, he is not precluded from recovery by reason of having intrusted the property, in respect to which he sues, to one known to him to be in the habit of getting intoxicated.[29] On neither point is plaintiff usually required, in the first instance, to prove his own freedom from negligence, until there is something in evidence to suggest such negligence.[30]

31. Damages.

It is essential to prove actual damage of a kind mentioned in the statute.[31] All three kinds of injury, viz., to

Adams *v.* State, 25 Ohio St. 586.

[27] See Jewett *v.* Wanshura, 43 Iowa, 574, s. c., 10 West. Jur. 559; Engleken *v.* Hilger, 43 Iowa, 563, s. c., 10 West. Jur. 553.

One who is injured by an intoxicated person cannot recover damages from the saloon-keeper who furnished such person with liquor, if he invited an intoxicated person to drink or by furnishing him with liquor contributed to his intoxication. Hays *v.* Waite, 36 Ill. App. 397.

[28] Reget *v.* Bell, 77 Ill. 593.

An intoxicated person, or one of known intemperate habits, is entitled to recover damages from the vendor for injuries caused by exposure resulting from the sale of liquor to him. Littell *v.* Young, 5 Pa. Super. 205.

But one who was an active and willing agent in procuring his own intoxication cannot recover for injuries caused by such intoxication. "The party complaining and seeking damages must be free from complicity in procuring the intoxication." People *v.* Linck, 71 Ill. App. 358.

[29] Bertholf *v.* O'Reilly, 8 Hun, 16, aff'd, 74 N. Y. 509.

[30] See, also, chapter XXXI, paragraph 37 of this vol.

Intoxication of the plaintiff is no defense in an action against the seller for injuries done the plaintiff by an intoxicated person. Heikkala *v.* Isaacson, 178 Mich. 176, 144 N. W. Rep. 508, 50 L. R. A. N. S. 857.

[31] Schneider *v.* Hosier, 21 Oh. St. 98; Freese *v.* Tripp, 70 Ill. 496; Graham *v.* Fulford, 73 Ill. 596; Westbrook *v.* Miller, 98 App. Div. 590, 90 N. Y. Supp. 558.

The inconveniences to which the wife was put, the hardships she suffered, the sickness of her children, are not proper elements of

person, to property, and to means of support, pertain to but one cause of action, but the evidence may be restricted to those kinds which the complaint indicates had been sustained.[32]

32. — to the Person.

Mental suffering and indignity, are not alone sufficient to sustain the action.[33] But if evidence is given of physical injury and suffering—such as that caused by an assault, or by any act which would, if committed by a stranger, be a trespass, for instance, turning out of the house—then the injury to feelings and the indignity, become part of the actual damages.[34]

damage. Hanewacker *v.* Ferman, 152 Ill. 321, 38 N. E. Rep. 924.

[32] See Mulford *v.* Clewell, 21 Ohio St. 191; Hackett *v.* Smelsley, 77 Ill. 109; Mason *v.* Shay, 1 Am. L. Rec. 553, affi'd in 3 Id. 435.

Where there is no evidence that the wife suffered actual damages, she should be limited to the minimum fixed by statute. Hink *v.* Sherman, 164 Mich. 352, 129 N. W. Rep. 732.

[33] Peterson *v.* Knoble, 35 Wis. 80, DIXON, C. J.; and see Wightman *v.* Devere, 33 Id. 570; S. P., in libel, 6 Hun, 5. And it seems that a wife's loss of the society of her husband is not enough. Dunlavey *v.* Watson, 38 Iowa, 398. Compare 56 Barb. 204. As to loss of services, see Hunt *v.* Town of Winfield, 36 Wis. 154, and cases cited. Terre Haute Brewing Co. *v.* Ward, 56 Ind. App. 155, 102 N. E. Rep. 395, 105 N. E. Rep. 58.

A wife may recover for the feeling of shame, disgrace and mortification arising from the public conviction of her husband for drunkenness resulting proximately from the sale of liquor to him by the defendant. Lucker *v.* Liske, 111 Mich. 683, 70 N. W. Rep. 421.

[34] DIXON, C. J., Peterson *v.* Knoble (above). *Contra*, McCann *v.* Roach, 81 Ill. 213; and see, against damages for mental distress, Brantigam *v.* White, 73 Ill. 561; Calloway *v.* Layton, 47 Iowa, 456, S. C., 17 Alb. L. J. 314. It may depend on the language of the act. See Friend *v.* Dunks, 37 Mich. 25. A married woman may recover under the civil damage act for the feeling of shame, disgrace and mortification arising from the public conviction of her husband for drunkenness resulting proximately from the sale of liquor to him by the defendant, even though the trial and conviction were had after she had commenced suit. Lucker *v.* Liske, 111 Mich. 683, 70 N. W. Rep. 421.

The record of the conviction of the husband is therefore admis-

33. — to Property.

In general, the same rules apply to proof of injuries to property in these actions, as would be applied in actions against the intoxicated person. Thus, in a wife's action, she need not give such evidence of her title to the property injured or taken, as might be necessary as against her husband's creditors. It is enough if she proves that she always claimed and treated it as hers, and that her husband conceded it to be hers.[35] Under this or the following head of damage, plaintiff may also recover the expenses necessarily imposed on him or her, by the sickness of the intoxicated person, such as medical attendance, nursing, etc.[36]

34. — to Means of Support.

To establish this ground of recovery, dependence for support, in some degree at least, must be shown.[37] To prove

sible in such action, not to prove the fact of drunkenness, but to show the extent and nature of the injury suffered by the wife. (Id.) A newspaper article giving an account of a saloon row, and that the husband participated therein, is admissible as bearing upon the mental anguish suffered by the plaintiff. (Id.)

The defendant may show, in mitigation of damages for injury to plaintiff's feelings, that the suit was brought to harass him or that the person for causing whose intoxication the action was brought, was in the habit of becoming intoxicated prior thereto. Leibler *v.* Carrel, 155 Mich. 196, 118 N. W. Rep. 975.

[35] Woolheather *v.* Risley, 38 Iowa, 486. Nor is it necessary for her to show that she pursued an independent remedy against a third person to whom the intoxicated husband transferred the property. Mulford *v.* Clewell, 21 Oh. St. 191.

[36] Wightman *v.* Devere, 33 Wis. 570.

There can be no recovery for medicine or medical attendance other than by those dependent upon the intoxicated person for support. Coleman *v.* People, 78 Ill. App. 210.

The plaintiff cannot recover for medical attendance furnished her son who was injured by reason of his intoxication where no proof has been made as to the doctors' bills, the amount or who incurred liability therefor. Van Alstine *v.* Kaniecki, 109 Mich. 318, 67 N. W. Rep. 502.

[37] Volans *v.* Owen, 74 N. Y. 526, rev'g 9 Hun, 558.

An illegitimate child injured in

loss of support, plaintiff, having shown a legal right to support from a husband or parent, may show that the ability of the latter, for supporting, was impaired by the intoxication, or by consequent sickness or other incapacity;[38] that the intoxication prevented his obtaining employment,[39] or that his death was caused either by his intoxication or by another intoxicated person whose intoxication was caused by defendant.[40] "Means of support" in the statute includes the wages or produce of labor, and, hence, the husband's capacity for labor,[41] as well as moneys and goods in his hands for that support, and which were necessary and proper for it, with due regard to the circumstances and condition in

its means of support by reason of a parent's intoxication, may maintain an action for damages. Goulding *v.* Phillips, 124 Iowa, 496, 100 N. W. Rep. 516.

A married woman injured in person, property or means of support by reason of unlawful sale of intoxicating liquors to a son may maintain a suit for damages notwithstanding her husband, father of such son, be living. McMaster *v.* Dyer, 44 W. Va. 644, 29 S. E. Rep. 1016.

Though a son be under no legal obligation to contribute to the support of the family, still if he does at various times send money for that purpose, the parent is entitled to recover, since Pub. St. Ch. 100, § 21, which gives to every person who is injured in person, property or means of support by an intoxicated person, a right of action against those causing the intoxication, applies to a case of partial dependence. McNary *v.* Blackburn, 180 Mass. 141, 61 N. E. Rep. 885.

[38] Mulford *v.* Clewell (above). According to the Illinois cases the effect must have been substantially to impair necessary and proper support. 73 Ill. 187, 561, 81 Id. 213.

[39] Roth *v.* Eppy, 80 Ill. 283.

[40] Brockway *v.* Patterson, 72 Mich. 122, 40 N. W. Rep. 192, 1 L. R. A. 708; Jackson *v.* Brookins, 5 Hun, 530; Smith *v.* Reynolds, 8 Id. 128; Quain *v.* Russell, Id. 319; Emory *v.* Addis, 71 Ill. 273; Hackett *v.* Smelsley, 77 Id. 109. *Contra*, Hayes *v.* Phelan, 4 Hun, 733, 5 Id. 335, note; Collier *v.* Early, 54 Ind. 559; Davis *v.* Justice, 31 Ohio St. 359.

Evidence that the husband's intoxication prevented him from procuring or holding a permanent position, is competent. Mather *v.* Story City Drug Co., 130 Iowa 111, 106 N. W. Rep. 368, 8 Ann. Cas. 275.

[41] Schneider *v.* Hosier, 21 Ohio St. 98; Wightman *v.* Devere, 33 Wis. 570.

life [42] of the couple. Upon this point the plaintiff may give evidence of the age, condition and circumstances of the husband or parent, and his habits of sobriety and industry, and capacity to earn or produce.[43] The evidence need not be clear, positive and specific as to the time, place, manner, and each item of loss. The injury may be proved like any other fact, by circumstances.[44] It is not necessary to show that plaintiff was exclusively dependent on such means; [45] nor is the recovery confined to past and present losses; but may include the loss of future means.[46] It is enough to show that the means of support have been diminished below what is reasonable and competent for the plaintiff's station in life, and below what they would otherwise have been.[47] If, however, others, also dependent, were also injured in means of support, the plaintiff's recovery should be limited to a proper share.[48]

35. Exemplary Damages.

To recover exemplary damages, (which may be had against the owner as well as the seller),[49] there must be evidence not only of actual damage,[50] but of conduct wilful,

[42] Hackett *v.* Smelsley, 77 Ill. 109.

[43] Dunlavey *v.* Watson, 38 Iowa, 398.

Where the unlawful sales contributed to bringing about the total disability of the plaintiff's husband, mortality tables are competent in determining the amount of damages. Merrinane *v.* Miller, 157 Mich. 279, 118 N. W. Rep. 11, 25 L. R. A. N. S. 585.

[44] Horne *v.* Smith, 77 Ill. 381.

[45] Hackett *v.* Smelsley (above).

[46] Mulford *v.* Clewell, 21 Ohio St. 191; Mason *v.* Shay, 3 West. L. Rec. 453, affi'g 1 Id. 553.

In estimating the plaintiff's damages, a jury may consider not only the earnings of the decedent for any given period, but also the probable length of his life till terminated by natural causes. Betting *v.* Hobbett, 142 Ill. 72, 30 N. E. Rep. 1048.

[47] Id.; McMahon *v.* Sankey, 133 Ill. 636, 24 N. E. Rep. 1027.

[48] Franklin *v.* Schermerhorn, 8 Hun, 112.

[49] Hackett *v.* Smelsley, 77 Ill. 109.

[50] Ganssly *v.* Perkins, 30 Mich. 492.

Damages for injury to feelings, shame, mortification, mental anxiety, insulted honor, and indignation are regarded as actual damages for which compensation is to

wanton, reckless, or otherwise deserving of condemnation beyond the mere actual damage.[51] Evidence that the sale was made against the plaintiff's remonstrance,[52] or after her notice not to sell, or was an attempt to hinder the reform of the drinker, is enough.[53]

36. — Defenses; Limitations.

The limitation applicable to a tort or injury to the person, applies, as of the time of the sale, not the time of damage sustained.[54]

be given. Hink *v.* Sherman, 164 Mich. 352, 129 N. W. Rep. 732.

[51] Ellsworth *v.* Cummins, 134 Ill. App. 397; COOLEY, J., Kreiter *v.* Nichols, 28 Mich. 500, S. P., Bates *v.* Davis, 76 Ill. 222; Franklin *v.* Schermerhorn, 8 Hun, 112. But a breach of the peace is not essential. Goodenough *v.* McGrew, 44 Iowa, 670. According to Gansly *v.* Perkins (above), the wilfulness must be one which contemplated injuring the plaintiff specially. According to Mason *v.* Shay, 1 Am. L. Rec. 553; affi'd in 3 Id. 435, exemplary damages are allowable wherever the sale was criminal. S. P., Schneider *v.* Hosier, 21 Ohio St. 98. Whether acts which are punishable criminally, are ground of exemplary damages, see, in the *affirmative*, Brannon *v.* Silvernail, 81 Ill. 434; in the *negative*, Koerner *v.* Oberly, 56 Ind. 284.

Exemplary damages are not recoverable except on proof of aggravating circumstances with which the defendant is connected. Reid *v.* Terwilliger, 116 N. Y. 530, 22 N. E. Rep. 1091.

[52] Gansly *v.* Perkins (above).

Evidence that a person was often intoxicated; that he frequented the defendant's saloon, and drank liquor there while intoxicated and was often drunk upon the streets of the village where he lived, tends to show knowledge on the defendant's part that he was an habitual drunkard and warrants an award of exemplary damages. Earp *v.* Lilly, 217 Ill. 582, 75 N. E. Rep. 552.

[53] Hackett *v.* Smelsley, 77 Ill. 109; Meidel *v.* Anthis, 71 Id. 241. So, perhaps, of clandestine sales. Hoard *v.* Peck, 56 Barb. 202. And of sales under sham pretext of a medical prescription. People *v.* Safford, 5 Den. 112. Previous habits of intoxication are not matter of aggravation, unless shown to have been known to defendant. Goodenough *v.* McGrew (above).

Notice by the plaintiff to one in charge of a saloon not to sell any liquor to her son is sufficient notice to the owner, and his disregard of it justifies an award of exemplary damages. Danley *v.* Hibbard, 222 Ill. 88, 78 N. W. Rep. 39.

[54] Emmert *v.* Gill, 39 Iowa, 602; but see paragraph 19; O'Connell

37. — Sale as Medicine.

According to some authorities, general provisions of statute in restraint of sales of liquor, with no reference to sales for medical use, are to be construed with an implied exception of sales, made in good faith, of medicines, bitters, and tinctures,[55] as well as of liquors sold on a physician's prescription.[56] Assuming this to be the rule applicable under this act, the question whether the sale was such, or was only a disguise for a sale of a beverage, is one of fact for the jury; and it is competent to prove the circumstances, such as the composition and character of the alleged medicine or bitters, the proportion of alcohol in it, and whether it does readily or with difficulty produce intoxication, whether it is agreeable or nauseous to the taste, whether it is useful or not as a medicine, and whether it was frequently resorted to and used as a beverage.[57] But mere ignorance of the intoxicating character of a beverage, is not competent,[58] except on the question of exemplary damages.

v. O'Leary, 145 Mass. 311, 14 N. E. Rep. 143.

Although the recovery of damages is limited to sales made within five years, evidence that the plaintiff warned the defendant more than five years before bringing suit is admissible. Siegle *v.* Rush, 173 Ill. 559, 50 N. E. Rep. 1008.

[55] Russell *v.* Sloan, 33 Vt. 656. *Contra*, Commonw. *v.* Hallett, 103 Mass. 452. Compare Kearney *v.* Fitzgerald, 43 Iowa, 580, s. c., 10 West. Jur. 555; State *v.* Wall, 34 Me. 165.

[56] Ball *v.* State, 50 Ind. 595; State *v.* Larremore, 19 Mo. 391; and see Williams *v.* State, 48 Ind. 306, 309; People *v.* Safford, 5 Den. 112; Shaffner *v.* State, 8 Ohio St. 642.

If the liquor is really bought to be used as a beverage and is sold by the druggist with the knowledge or belief that it is bought for that purpose, a prescription by a physician which calls for the liquor does not legalize the sale. Com. *v.* Gould, 158 Mass. 499, 33 N. E. Rep. 656.

[57] Russell *v.* Sloan (above); State *v.* Costa, 78 Vt. 198, 62 Atl. Rep. 38.

[58] Commonw. *v.* Boynton, 2 Allen, 160. See also paragraphs 13, 27 (above). HOAR, J., says that a man is held to know the law, and the hardship is no greater to ascertain the fact, S. P., 103 Mass. 452. As to ignorance as to the person by whom the liquor was sent for, see Bates *v.* Davis, 76 Ill. 222; Miller *v.* State, 5 Ohio. St. 275.

38. — Other Sellers Contributing to Injury.

Evidence that sales by persons not parties to the action, contributed to cause the intoxication, is not competent, even in mitigation, for the statute imposes liability in respect of sales causing intoxication in whole or in part.[59] But evidence that previous intoxication, caused by others' sales, impaired the means of support, is competent in mitigation.[60]

39. — Plaintiff's Connivance or Negligence.

Evidence that plaintiff requested the sale,[61] or purchased liquor, as such, for her husband,[62-63] is competent in bar; but in the former case she may prove in rebuttal that defendant knew she made the request by her husband's constraint. Evidence that he drank with her consent is not competent in bar, but is in mitigation,[64] and so evidence that she accompanied him and consorted with him in the defendant's sa-

[59] Fountain *v.* Draper, 49 Ind. 441, 445; Hackett *v.* Smelsley, 77 Ill. 109; Emory *v.* Addis, 71 Id. 273; s. p., Woolheather *v.* Risley, 38 Iowa, 486.

"It is not necessary that the liquor furnished by the defendant be the sole or even the principal cause of the alleged injury." Wiese *v.* Gerndorf, 75 Neb. 826, 106 N. W. Rep. 1025.

Where the defendant was charged with having sold liquor to the deceased which wholly or in part produced the intoxication, he was liable for the injuries resulting therefrom if the liquor which he sold, although not the sole cause of the intoxication, contributed to it. Lawson *v.* Eggleston, 28 App. Div. 52, 52 N. Y. Supp. 181; aff'g 164 N. Y. 600, 59 N. E. Rep. 1124.

[60] Woolheather *v.* Risley (above). See also Gansly *v.* Perkins, 30 Mich. 492; s. p., Cleveland, &c. R. R. Co. *v.* Sutherland, 19 Ohio St. 151.

[61] Jewett *v.* Wanshura, 43 Iowa, 574, s. c., 10 West. Jur. 559.

In an action by a minor son for injury to his means of support by defendant's sale of intoxicants to his father, the fact that the plaintiff procured the liquor from the defendant for his father is no bar where it appeared that the plaintiff was acting on his father's orders. Strattman *v.* Moore, 134 Ill. App. 275.

[62-63] Kearney *v.* Fitzgerald, 43 Iowa, 580, s. c., 10 West. Jur. 555; Engelken *v.* Hilger, 43 Iowa, 563, s. c., 10 West. Jur. 553.

[64] Roth *v.* Eppy, 80 Ill. 283.

The fact that the plaintiff voluntarily contributed money to her husband for the purchase of in-

loon, when he drank there, is competent in mitigation; but she may prove in rebuttal that she did not do so freely, but was compelled by him.[65] So evidence that they habitually drank together is competent in mitigation.[66] On the other hand, it has been held that where she might, without danger have prevented his drinking on the only occasion proven, and did not do so, she could not recover.[67]

40. — Former Adjudication; Satisfaction.

The fact that defendant has suffered a criminal conviction for the same sale, is not material; [68] nor is it a bar that plaintiff has settled a claim against another seller,[69] if the intoxications were separate and distinct.[70]

V. PROCEEDINGS IN REM FOR FORFEITURE

41. Burden of Proof.

Under the statutes, proof of probable cause for seizure and prosecution may throw on the claimant the burden of

toxicating liquors or that she gave permission to the defendant to supply her husband with all the intoxicating liquors he wanted is no defense in bar to an action for damages. Colman *v.* Loeper, 94 Neb. 270, 143 N. W. Rep. 295.

A wife who consents to the sale of liquor to her husband after she has given notice to the dealer not to do so, cannot recover. Tipton *v.* Thompson, 21 Tex. Civ. App. 143, 50 S. W. Rep. 641.

[65] Hackett *v.* Smelsley, 77 Ill. 109; Leverenz *v.* Stevens, 124 Ill. App. 401.

[66] Id. Compare Engelken *v.* Hilger, 43 Iowa, 563, s. c., 10 West. Jur. 553.

On the issue of a conspiracy between the plaintiff and her husband to obtain liquor from the defendant for the purpose of mulcting him in damages, evidence of the husband's abuse of his family when drunk is admissible.

[67] Regel *v.* Bell, 77 Ill. 593.

[68] Bedore *v.* Newton, 54 N. H. 117; Cook *v.* Ellis, 6 Hill, 466.

[69] Jewett *v.* Wanshura, 43 Iowa, 574, s. c., 10 West. Jur. 559.

The settlement with one of several persons who contributed to cause the intoxication of another, discharges all. Alrich *v.* Parnell, 147 Mass. 409, 18 N. E. Rep. 170.

[70] Miller *v.* Patterson, 31 Ohio St. 419; Jewell *v.* Welch, 117 Mich. 65, 75 N. W. Rep. 283.

proving innocence.[71] Defendant's refusal to produce his books and papers, raises a presumption that if produced, they would give a complexion to the case, at least unfavorable, if not directly adverse, to the interest of the party.[72]

42. Knowledge and Notice.

Defendant is bound by knowledge or notice which had at any time been communicated to him personally.[73] Also by that of which his agent was cognizant at the time of the transaction of the agent, not only if the knowledge was derived in the particular transaction, but equally if it was previously acquired, within a limit reasonable to presume recollection, and was such that the agent was at liberty to communicate it to his principal.[74]

43. Admissions and Declarations.

Where, as in the case of proceedings to enforce forfeiture of a ship,[75] or against a distillery,[76] the forfeiture and the proceedings are *in rem*, and the knowledge of the owner is not material, the admissions and declarations of the master or lessee, made during his holding that character, are competent.[77] So are memoranda and books containing relevant entries, found upon the premises.[78]

[71] Wood *v.* United States, 16 Pet. 342; Taylor *v.* United States, 3 How. (U. S.) 197; The Short Staple, 1 Gall. 103. And see Lilienthal's Tobacco *v.* U. S., 97 U. S. (7 Otto) 237. As to evidence of *fraudulent intent*, see Buckley *v.* U. S., 4 How. (U. S.) 251; Taylor *v.* U. S., 3 Id. 197; Alfonso *v.* U. S., 2 Story C. Ct. 421; Wood *v.* U. S., 16 Pet. 342; Bottomley *v.* U. S., 1 Story C. Ct. 135. As to competent evidence of value or cost, see Wood *v.* U. S., 16 Pet. 342; Buckley *v.* U. S., 4 How. (U. S.) 251; Alfonso *v.* U. S., 2 Story C. Ct. 421; Taylor *v.* U. S., 3 How. (U. S.) 197. Chapter XVI, paragraphs 20–23 of this vol.

[72] Clifton *v.* U. S., 4 How. (U. S.) 242, 247; The Luminary, 8 Wheat. 407. Compare Chaffee *v.* U. S., 18 Wall. 545.

[73] The Distilled Spirits, 11 Wall. 356, 366.

[74] Id. This is the English rule (17 C. B. N. S. 466), adopted in the U. S. Sup. Ct.; and see 33 Vt. 252.

[75] U. S. *v.* Little Charles, 1 Brock. Marsh, 347.

[76] Dobbin's Distilley *v.* U. S., 96 U. S. (6 Otto) 395, 399.

[77] Id. 403.

[78] Id.

44. Cogency of Proof.

A proceeding *in rem* for forfeiture, is a civil and not a criminal proceeding within the rule as to proof beyond reasonable doubt.[79] But the jurors ought to be clearly satisfied.[80]

VI. ACTIONS ON RECOGNIZANCES

45. Mode of Proof.

The authority of the magistrate who took the recognizance may be shown by parol evidence of his acts in that capacity, without producing his commission.[81] If the record to be proved is that of the court trying the case, the regular course is to produce and inspect the record.[82] Evidence is not admissible to contradict the record.[82½]

[79] Lilienthal's Tobacco *v.* U. S., 97 U. S. (7 Otto) 237, 267, 271; The Robert Edwards, 6 Wheat. 187.

No judgment of forfeiture can be rendered unless it is proved that the liquors or some part thereof were owned or kept or deposited by the person charged in the complaint. Com. *v.* Reed, 162 Mass. 215, 38 N. E. Rep. 364.

[80] Lilienthal's Tobacco *v.* U. S. (above).

[81] Webster *v.* Davis, 5 Allen, 393, 396.

[82] Longley *v.* Vose, 27 Me. 179, 184; Vrana *v.* Vrana, 85 Neb. 128, 122 N. W. Rep. 678.

[82½] Id.; People *v.* Hurlbutt, 44 Barb. 126.

CHAPTER LVII

PROCEEDINGS IN ADMIRALTY

1. Mode of proof.

1. Mode of Proof.

The strict rules of the common law in respect to the admission of evidence, are not fully applied.[83] The mode of

[83] Elwell *v.* Martin, Ware, 53; The J. F. Spencer, 3 Ben. 337. In admiralty, the admissions of the master, though made subsequently to the disaster, are competent against the owner, on the ground that when the transaction occurred the master represented the owner, and was his agent in navigating the vessel. This sort of evidence is confined to the confessions of the master, and cannot be extended to any other person in the employment of the boat, for in no proper sense has the owner intrusted his authority to any one but the master. The Potomac, 8 Wall. 590.

Since admiralty courts are courts requiring dispatch because of the nature of the questions of fact with which they deal and the usual transient character of the witnesses, "it is, therefore, no uncommon thing for these courts, in cases where justice will be advanced thereby, to receive some descriptions of testimony never admitted in other courts. . . . The strict rules of evidence, applied in the courts of common law, often lose much of their force when invoked in a court of admiralty." The Vivid, 28 Fed. Cas. Co. 16, 978; 4 Ben. 319.

Where the parties are not the same as in a former suit, testimony taken in the former case is inadmissible. The Oregon, 89 Fed. Rep. 520.

Statements made by the master of a vessel the day after a collision, are admissible against the vessel. The Severn, 113 Fed. Rep. 578.

Where the evidence is conflicting, the fact that the claimant failed to call a witness who knew all the facts will turn the scales against him. The Mary A. Troop, 90 Fed. Rep. 307.

Where a witness who had charge of a vessel's books testified before a commissioner as to matters in the books without producing them and such evidence is objected to but not on the ground that the books should be produced, it should not be excluded by the court. The Bulgaria, 83 Fed. Rep. 312.

proof is subject to rules prescribed by the Supreme Court.[84] The competency of witnesses depends on the laws of the State in which the court is held.[85] The proofs must substantially conform to and sustain the pleadings; and although the strict rules of the common law in respect to variance are not followed, yet, in general, the court will not permit a party to be surprised by the exhibition of proof materially variant from the case stated in the pleadings. But, unless the variance is calculated to mislead, the court may proceed to a decree.[86]

[84] U. S. Comp. Stat., § 1470, Blease *v.* Garlington, 92 U. S. (2 Otto) 1. Regulations as to proof in particular classes of actions will be found in U. S. Rev. Stat.

A court of admiralty does not have to conform to the practice of the State Court in taking depositions but may prescribe its own rules. The Westminster, 96 Fed. Rep. 766.

Hearsay testimony introduced on a hearing before a commissioner without objection at the time, is nevertheless of no value and will not support a finding. The Anson M. Bangs, 129 Fed. Rep. 103, 63 C. C. A. 605.

The sudden sheering of a vessel from her proper course, causing a collision, casts upon her the burden of showing freedom from fault. Minnesota S. S. Co. *v.* Lehigh Valley Tramp Co., 129 Fed. Rep. 22, 63 C. C. A. 672.

[85] U. S. Comp. Stat., § 1464.

In Graham *v.* Hopkins, 10 Fed. Cas. No. 5,669, Olcott, 224, which was an action against the washer of a ship to recover for wages, the court said: "the only testimony offered by the libellants in support of their claims is that of each libellant swearing for his co-libellant. This species of evidence, though legally admissible in actions *in rem* by seamen for wages, is always admitted with great caution, and necessarily with very considerable distrust."

An entry upon a log made with full knowledge and opportunity of ascertaining the truth must be accepted as true against the party making it. The New Foundland, 89 Fed. Rep. 510.

[86] The decree must correspond with and apply to the issues tried and any opinion of a judge embracing collateral matter is but judicial reasoning which should not be made the basis of or be incorporated in the judgment. Ward *v.* The Fashion, 29 Fed. Cas. No. 17,155, 6 McLean, 195, Newb. 41.

Where a libel alleged that jewelry valued at $5000 had been stolen by an employee of the libelled ship, but a value of $7000 was proved, the court held it could issue a decree for the additional $2000. The court said: "A court of admiralty has powers akin to those of a court of equity, and should

not be hampered in its efforts to reach a substantial justice by the inexorable rules invoked by the claimant." The Minnetouka, 146 Fed. Rep. 509, 77 C. C. A. 217.

But where it appeared that the libellant's steamer ran into a sunken coal flat which had been left unmarked the defense was not allowed to offer evidence that the captain of the steamer had no license to navigate on the waters in question and that therefore the crew was defective, inasmuch as the answer did not raise that objection. The court said: "The rule obtains as well in admiralty as in other cases that the proof cannot avail a party further than it corresponds with the allegations of the pleadings." See cases cited. Second Pool Coal Co. *v.* People's Coal Company, 188 Fed. Rep. 892, 110 C. C. A. 526; aff'g 181 Fed. Rep. 609.

The testimony at the hearing of a cause in admiralty should be taken in full by an official stenographer appointed under sanction of the court. Neilson *v.* Coal, etc., Co., 122 Fed. Rep. 617, 60 C. C. A. 175.

PART III

EVIDENCE AFFECTING PARTICULAR DEFENSES

CHAPTER LVIII

DEFENSES IN ABATEMENT

1. Parties. 2. Another action pending.

1. Parties.

The mode of proving the facts necessary to establish the incapacity of a party, or the interest of a person not made a party, has already been discussed in the chapters on actions by and against particular classes of persons. The sworn schedules in bankruptcy or insolvency made by plaintiff, and containing no mention of the claim he sues on, are competent,[87] but not conclusive,[88] against him. The like schedules of the third person, alleged to be the real party in interest, are not competent,[89] without evidence to connect

[87] Springer *v.* Drosch, 32 Ind. 486, s. c., 2 Am. Rep. 356.

The pendency of a creditor's bill does not bar another creditor from proceeding by an original bill. American Pig-Iron Storage Warehouse Co. *v.* German, 28 So. Rep. 603, 126 Ala. 194, 84 Am. St. Rep. 21.

[88] See Cram *v.* Union Bank, 1 Abb. Ct. App. Dec. 461, affi'g 44 Barb. 426. A sworn statement in a pleading is not a conclusive admission.

"'An action commenced during the pendency of an appeal from a judgment sustaining a demurrer to plaintiff's complaint, in a suit on the same cause of action brought by the same plaintiff against the same defendant, will be abated.'" Westervelt *v.* Jones, 7 Kan. App. 70, 52 Pac. Rep. 194.

[89] Turner *v.* See, 57 N. Y. 667.

"The general rule is, that the pendency of a creditor's bill brought by one creditor in behalf of all creditors of the common debtor, can not be successfully pleaded in abatement or in bar of a subsequent bill brought by a different creditor in a different

plaintiff with them. Correspondence between the plaintiff and the third person is competent, if part of the *res gestæ*.[90]

2. Another Action Pending.[91]

The pendency of another action, to be admissible, must be pleaded,[92] unless it appears in the face of the complaint.[93]

right, until after decree has been rendered in the former suit, under which all may come in and participate." Sweeney Manufg. Co. *v.* Goldberg, 66 Ill. App. 568.

The holder of a second mortgage cannot plead in abatement of a suit to foreclose the first mortgage, a judgment of foreclosure of the first mortgage where he was not a party to the former foreclosure. Babbitt *v.* Field, 52 Pac. Rep. 775, 6 Ariz. 6.

[90] May *v.* Brownell, 3 Vt. 463.

Where all the necessary parties were joined in a former suit, the fact that certain persons who have become interested in the subject matter since the former suit was instituted are parties to a subsequent suit in reference to the same subject matter, does not prevent the pleading of the pendency of former suit in abatement of the subsequent suit, there being a "substantial identity of parties." Haas *v.* Righeimer, 77 N. E. Rep. 69, 220 Ill. 193.

[91] For the facts to be established, see Watson *v.* Jones, 13 Wall. 679.

"I think that, after a suit is brought by one lien holder for the benefit of himself and others, no other can sue." Foley *v.* Riley, 27 S. E. Rep. 268, 43 W. Va. 513.

"'It may be safely stated that, as a general rule, the pendency of a former action between the same parties may be shown in abatement, where a judgment in such suit would be a bar to a judgment in the second suit brought in another court of concurrent jurisdiction.'" Richardson *v.* Opelt, 82 N. W. Rep. 377, 60 Neb. 180.

[92] White *v.* Talmage, 35 Super. Ct. (J. & S.) 223; Estes *v.* Farnham, 11 Minn. 423; Hollister *v.* Stewart, 111 N. Y. 644, 19 N. E. Rep. 782; Commonwealth *v.* Cope, 45 Pa. 161; Morton *v.* Sweester (Mass.), 12 Allen, 134.

Unless the court in which the prior action is pending be shown to have full and competent jurisdiction to adjudicate the issues, the pendency of such action cannot be pleaded in abatement. Vandenbark *v.* Mattingly, 56 N. E. Rep. 473, 62 Ohio St. 25.

The pendency of a suit in replevin by A against B cannot be pleaded in abatement of a suit in replevin for the same chattel

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[93] Moak's Van Santv. Pl. 744. But see N. Y. Code Civ. Pro., § 499.

"If the pendency of another action for the same cause of action in another State can be pleaded at

Under an allegation of another action pending, a judgment recovered since commencement of the present action is evidence unless offered as a bar.[94] The record, or at least the docket entry, is the primary evidence.[95] Oral evidence of the

by C against B. Ilsley *v.* Stubbs, 5 Mass. 280.

A suit brought by one taxpayer on behalf of himself and all other taxpayers similarly situated, may be pleaded in abatement of a suit by some of the other taxpayers based on the same grievance. Gamble *v.* San Diego (C. C.), 79 Fed. Rep. 487. But it is otherwise where the prior suit is not brought in a representative capacity. Davis *v.* Petrinovich, 112 Ala. 654, 21 So. Rep. 344, 36 L. R. A. 615.

A suit by A against B for the use of C cannot be pleaded in abatement of a suit on the same subject matter by A against B for the use of D. Foreman Shoe Co. *v.* Lewis, 60 N. E. Rep. 971, 191 Ill. 155.

The fact that in the prior suit the plaintiff was styled trustee and in the later suit the same plaintiff was styled receiver, will not prevent the pendency of the former being pleaded in abatement of the latter. Shepard *v.* Meridian Nat. Bank, 48 N. E. Rep. 352, 149 Ind. 20.

The pendency of a suit by the owner of certain goods for their conversion cannot be pleaded either in bar or in abatement of a suit by the bailee of the same goods brought against the same party. Aldrich *v.* Hodges, 164 Mass. 570, 42 N. E. Rep. 107.

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all, it can only be pleaded in abatement." Moore *v.* Spiegel, 143 Mass. 413, 9 N. E. Rep. 827.

"The doctrine that a subsequent action may be abated by the pendency of a prior one between the same parties for the same cause does not apply where the prior action is pending in the courts of another state or in a foreign country." Schmidt *v.* Posner, 106 N. W. Rep. 760, 130 Iowa, 347.

[94] Krekeler *v.* Ritter, 62 N. Y. 372. There should be a supplemental answer to make such judgment conclusive.

The fact that a second suit is started between the same parties with reference to the same subject matter will not abate the former action. George *v.* Hesse, 115 S. W. Rep. 314, 53 Tex. Civ. A. 344.

A suit on a note in one state to recover the balance due thereon will not be abated on the ground that formerly in another state a suit to foreclose a mortgage securing the note had been prosecuted where it appears that no deficiency judgment had been entered in the foreclosure. Franklin *v.* Conrad-Stamford Co., 137 Fed. Rep. 737, 70 C. C. A. 171.

[95] Philadelphia, &c. R. R. Co. *v.* Howard, 13 How. (U. S.) 307.

pendency of the action is secondary.[96] Oral evidence as to the questions involved is admissible, within the limits stated in respect to former adjudications.[97] Proof of the pendency of the former action within reasonable limits of time, raises a presumption of its continued pendency, which throws on plaintiff the burden of showing the contrary.[98]

[96] Wright *v.* Maseras, 56 Barb. 521.

The pendency of a former suit may be established by reading in evidence a copy of the declaration served upon the defendant's attorney instead of by producing the original. Romaine *v.* New York, etc., Ry., 87 App. Div. 569, 84 N. Y. Supp. 491.

[97] See Chapter LXI; s. p., Nichols *v.* Smith, 42 Barb. 381.

A plea of pendency of another action between the same parties and about the same subject matter is not sustained by proof of mere service of a summons in the former action, and parol evidence is inadmissible in such a case to show that the subject of that controversy was the same as that of the present action. Curry *v.* Wiborn, 12 App. Div. 1, 42 N. Y. Supp. 178.

Where the second of two suits between the same parties with reference to the same subject matter is broader and includes more matters in litigation, it will not be abated because of the pendency of the prior suit. Madison *v.* Ducktain Sulphur, etc., Co., 113 Tenn. 331, 83 S. W. Rep. 658.

[98] Fowler *v.* Byrd, Hempst. 213.

"Proof of the commencement of an action is not sufficient to show that it is an action pending at the time when the plea is interposed. The party interposing such a plea is bound to show, as a matter of fact, the continued existence of such suit as a pending action." Hirsh *v.* Manhattan Ry. Co., 84 App. Div. 374, 82 N. Y. Supp. 754.

"We are therefore all of opinion, whatever might be the effect of such a plea with more full and complete averments, showing the jurisdiction of the court of another State over the subject and over the persons of the parties, that the common allegation, that the same plaintiffs have impleaded the same defendant for the same cause of action, in a court of another State, in an action which is still pending, is not a good plea in abatement to an action otherwise rightfully commenced and prosecuted in the courts of this Commonwealth." Newell *v.* Newton, 10 Pick. (Mass.) 470.

CHAPTER LIX

DEFENSES DENYING OR IMPEACHING THE CONTRACT SUED ON

I. Denial of assent.
1. Fraud or deceit.
2. Mistake.
3. Duress.
4. Want of consideration.
5. Statute of frauds.
6. Forgery.
7. Alterations.

II. Illegality of contract.
8. General rules.
9. Compounding felony.
10. Sunday laws.
11. Usury: pleading; burden of proof.
12. — estoppel by certificate.

II. Illegality of contract — *continued.*
13. — oral evidence.
14. — variance.
15. — intent.
16. — covers for usury.
17. — act of agent or co-trustee.
18. — inception.
19. — declarations and admissions.

III. Incapacity of contracting party.
20. Infancy.
21. — new promise: admissions and declarations.
22. Insanity.

I. DENIAL OF ASSENT

1. Fraud or Deceit.

Fraud by defendant,[99] or his agent,[1] in procuring the execution of even a sealed instrument sued on, may always be

[99] Otherwise of that of a principal debtor in inducing sureties to sign, unless there is evidence that the creditor was privy to it. Coleman *v.* Bean, 1 Abb. Ct. App. Dec. 394.

Where action is brought on a promissory note given pursuant to a contract induced by fraud of the plaintiff, such fraud is no defense where the defendant was not a party to the contract but is merely a surety for the successor of a party to that contract. Elliott *v.* Brady, 192 N. Y. 221, 85 N. E. Rep. 69, 127 Am. St. Rep. 898, 18 L. R. A. N. S. 600, aff'g 118 App. Div. 208, 103 N. Y. Supp. 156.

[1] The representations of the agent being shown to have been made as part of the *res gestæ.* Sandford *v.* Handy, 23 Wend. 260.

proved, if alleged.[2] The burden is on the party who relies on it to allege and prove it,[3] unless a fiduciary relation is shown.[4] A mere allegation of false representation does not admit evidence of intent to deceive.[5] An allegation of fraud does not admit of evidence of rescission,[6] nor of an omission not shown to be fraudulent.[7]

Inadequacy of consideration may be so gross as to be

But a note given to the vendor of properties by fraudulent procurement of third persons, is not invalid where it is not shown that such representations were made by the third persons on the authority or procurement of the vendor. Tradesmen's Nat. Bank *v.* Looney, 99 Tenn. 278, 42 S. W. Rep. 149, 63 Am. St. Rep. 830, 38 L. R. A. 837.

[2] Finck *v.* Schmidt, 48 Misc. 503. At common law as well as in equity. Hartshorn *v.* Day, 19 How. (U. S.) 211, 222.

But "a party who claims to have been defrauded in the execution of a contract must assert this defense within a reasonable time after a suit has been brought against him to enforce the contract, or within a reasonable time after he has discovered the fraud, or else he will be deemed to have waived his right to rely on the alleged fraud in the execution of the contract." Fletcher *v.* Wireman, 152 Ky. 565, 153 S. W. Rep. 982; Pomeroy on Equity Jurisprudence, Vol. 2, § 964.

[3] Beatty *v.* Fishel, 100 Mass. 448; Vint *v.* King, 2 Am. Law Reg. 712. For a summary of the material facts, under the new procedure, see Frenzel *v.* Miller, 37 Ind. 1, s. c., 10 Am. Rep. 62, and 17 Alb. L. J. 507.

A corporation, the payee of certain promissory notes, transferred them for value to its president, who in turn delivered them to a third person, receiving payment therefor. On the failure of the maker to pay the notes, the third person obtained payment from the president, who sued the maker for the amount of the notes. It was held that the defendant could not on the trial introduce evidence of fraud on the part of the corporation on the theory that the holder as officer of the corporation was chargeable with its fraud. Horan *v.* Mason, 141 App. Div. 89, 125 N. Y. Supp. 668.

[4] See Chapter XI, paragraph 5 and chapter L, paragraph 3.

[5] Lefler *v.* Field, 52 N. Y. 621; Dubois *v.* Hermance, 56 N. Y. 673, affi'g 1 Supreme Ct. (T. & C.) 293.

Under a plea in recoupment, evidence that the defendant was induced by fraud to enter into the contract, is inadmissible. Mail, etc., Co. *v.* Wood, 140 Mich. 505, 103 N. W. Rep. 864.

[6] Fox *v.* Griffin, 2 Allen, 1, 7.

[7] Dudley *v.* Scranton, 57 N. Y. 424.

competent under an issue of fraud.[8] Evidence having a tendency to establish fraud is not incompetent, by reason of the tendency being slight.[9] So of evidence slightly tending to show good faith.[10] Evidence of the general habits of the party alleged to be defrauded, showing him peculiarly susceptible to be imposed on, is competent.[11] The neglect to produce evidence in the power of the party charged with fraud is especially significant on this issue.[12]

Preponderance of evidence is enough.[13]

The fact of having restored, or offered to restore, must be alleged, to be admissible.[14]

2. Mistake.

The presumption is that a grantor, who was of competent capacity to do business, knew the contents of a deed signed and delivered by him.[15] His mistake must be clearly and

[8] Eyre *v.* Potter, 15 How. (U. S.) 42; Vint *v.* King (above).

"A written agreement, based on a consideration, cannot be questioned in a law action, for alleged fraud or deceit, affecting its execution, except upon a denial of its execution amounting to a plea of *non est factum*, or if it is an unsealed instrument, *non assumpsit*." Interior Warehouse Co. *v.* Dunn, 80 Or. 528, 157 Pac. Rep. 806.

[9] Hubbard *v.* Briggs, 31 N. Y. 518.

[10] See Gray *v.* Lessington, 2 Bosw. 257.

Proof of facts which would have put a reasonably prudent man on inquiry, does not finally dispose of the question of good faith. Rolla Nat. Bank *v.* Rominee, 136 Mo. App. 57, 117 S. W. Rep. 104.

[11] Kauffman *v.* Swar, 5 Penn. St. (5 Barr.) 230.

A party is not necessarily precluded from contesting the validity of a contract on the ground of fraud by the fact that he failed to read it. Tanton *v.* Martin, 80 Kan. 22, 101 Pac. Rep. 461.

[12] Cheney *v.* Gleason, 117 Mass. 557.

[13] Clason *v.* Stewart, 23 Misc. 177, 51 N. Y. Supp. 1100; Jones *v.* Greaves, 26 Ohio St. 2, s. c., 20 Am. Rep. 752. Compare Chapter XXVI, paragraph 31 of this vol.

[14] Devendorf *v.* Beardsley, 23 Barb. 656. An offer to allow judgment may be enough. Harris *v.* Equit. L. Assn. Soc., 64 N. Y. 196.

[15] Saginaw Medicine Co. *v.* Batey, 179 Mich. 651, 146 N. W. Rep. 329; Souverbye *v.* Arden, 1 Johns. Ch. 240. As to who has the burden of proof if the signer is shown to have been illiterate, compare Add. on Contr. 7th ed. 226; King *v.* Langnor, 1 Nev. & M. 576; School Com. *v.* Kesler, 67 N. C. 443; Selden *v.* Myers, 20 How.

strongly proved before the court can relieve against it.[16] Evidence of mental reservations, or of subsequent oral declarations, is not enough, even where the deed remained in his possession.[17]

3. Duress.

Actual violence need not be proved.[18] The act must be shown to have been induced by the coercion; this is not necessarily presumed.[19]

4. Want of Consideration.

Original want of consideration may be proved, when consideration is in issue.[20] Inadequacy of consideration is not

(U. S.) 506; Stacy *v.* Ross, 27 Tex. 3; Sims *v.* Bice, 67 Ill. 88; Dorsheimer *v.* Rorbach, 8 C. E. Green (N. J.), 46.

"There is no doubt that the signing of a contract permits the inference that the signer had knowledge of its contents." People *v.* Dunbar Contracting Co., 215 N. Y. 416, 109 N. E. Rep. 554.

[16] Id.

[17] Id.

In the absence of fraud or imposition, the signing of a contract gives rise to a conclusive presumption that the person signing had read and assented to its terms. Fivey *v.* Pennsylvania R. Co., 67 N. J. L. 627, 52 Atl. Rep. 472, 91 Am. St. Rep. 445.

[18] See United States *v.* Huckabee, 16 Wall. 414, and chapter XIV, paragraph 4 of this vol. For conflicting definitions of duress, see 7 Wall. 214, 14 Id. 332; 49 Ind. 573, s. c., 19 Am. Rep. 695, 70 N. Y. 497, and cases cited.

It has been held that an innocent purchaser for value before maturity of a note will be protected even though the note was procured by duress of the payee. Pate *v.* Allison, 114 Ga. 651, 40 S. E. Rep. 715. But see chapter XXII, paragraphs 104–106.

[19] Feller *v.* Green, 26 Mich. 70. But compare Tilley *v.* Damon, 11 Cush. 247.

"Where one enters into a contract by reason of compulsion or threats, there is nothing but the form of a contract without its substance. When a party is entitled to water from a ditch company and does all that the laws of the state require him to do in order to get that water, the company is bound to deliver the water, and cannot legally require the party making the application to sign a special contract binding him to do things which the law does not require him to do." Green *v.* Byers, 16 Ida. 178, 101 Pac. Rep. 79.

[20] Payment of consideration expressed, though acknowledged under seal, may be disproved, if

a defense;[21] unless so gross as to sustain an inference of fraud.[22] Subsequent failure of consideration, to be admissible,—even where it consists in the fact that the contract was made in consideration of an executory agreement, which was afterward broken,[23]—must be pleaded.

material. Baker *v.* Cornell, 1 Daly, 469; and see chapter XLVIII, paragraph 9, chapter LI, paragraphs 5, 12, of this vol. But disproving it does not make the contract void as against the contractor for want of consideration. Id.

The defence of want of consideration, like the defences of infancy, limitation and other affirmative defences, must be specifically pleaded in order to be available. Van Jellico Mining Co. *v.* Rollins, 108 S. W. Rep. (Ky.) 235.

But where "the complaint sets out the consideration for the contract sued on, and in addition makes the contract an exhibit, and the contract sets out the consideration, evidence of want of consideration is admissible under the general denial." Smith *v.* Frantz, 59 Ind. 260, 109 N. E. Rep. 407.

[21] Earle *v.* Peck, 64 N. Y. 596, and cases cited.

Failure of consideration is a defense to an action on a note by a subsequent holder with notice (Hale *v.* Aldaffer, 5 Kan. App. 40, 47 So. Rep. 320, 52 Pac. Rep. 194), but should be specifically pleaded. Scott *v.* Rawls, 159 Ala. 399, 48 So. Rep. 710.

[22] Greer *v.* Tweed, 13 Abb. Pr. N. S. 427. Or except where, as in contracts in restraint of trade, or between parties in a fiduciary relation (and, to some extent, in specific performance), the court refuses to enforce without adequate consideration.

But where the defendant gave his note to his brother payable to the plaintiff in order to secure peace between the brother and the plaintiff who were man and wife, the note was entirely without consideration and unenforcible against the maker. Kramer *v.* Kramer, 181 N. Y. 477, 74 N. E. Rep. 474, rev'g 90 App. Div. 176, 86 N. Y. Supp. 129.

[23] Batterman *v.* Pierce, 3 Hill, 171; Wilson *v.* Wilson, 37 Md. 1, s. c., 11 Am. Rep. 518. But compare Walker *v.* Millard, 29 N. Y. 375. To illustrate the distinction in another way—if a note is given in consideration of the assignment of a patent, the invalidity of the patent is an original want of consideration; but if the patent be valid, its worthlessness is only a failure of consideration; and even this is not conceded to be a defense, for the court may decline to inquire into the adequacy of the consideration where there was no fraud or mistake. Miller *v.* Finley, 26 Mich. 249, s. c., 12 Am. Rep. 306; Eldridge *v.* Mather, 2 N. Y. 157; Nash *v.* Lull, 102 Mass. 60, s. c., 3 Am. Rep. 435, and cases cited. Compare Clough *v.* Patrick, 37 Vt. 421.

"A conveyance of real estate

5. Statute of Frauds.

The rule of pleading,[24] and the principal rules as to the mode of proof,[25] have been already stated.

The burden is on defendant to show affirmatively that the value was in excess of the statute limit,[26] or that the stipulation precluded performance within one year, etc.[27] The statute of another State, if relied on, should be proved as a fact.[28]

made by a parent to a child in consideration of an undertaking to furnish the parent a comfortable home during life will be set aside upon the application of the parent, where the child, after receiving the conveyance, fails to keep his agreement." Henson *v.* Cooksey, 237 Ill. 620, 86 N. E. Rep. 1107, 127 Am. St. Rep. 345.

Where, in addition to setting up a proper defense of want of consideration, the defendant insufficiently alleges and proves fraud, he may nevertheless prevail on the former defense. Underwood *v.* Germania L. Ins. Co., 152 N. C. 274, 67 S. E. Rep. 587.

[24] Chapter XIX, paragraph 28, chapter XXV, paragraph 2, chapter XXVIII, paragraph 1, and chapter XLIX, paragraph 1 of this vol.

[25] Requisite memorandum, chapter XVI, paragraphs 7, 23, 27, 33, 34 and 43, chapter XIX, paragraph 13. Part performance, chapter XLIX, paragraph 12. Guaranty, chapter XXIV.

[26] Crookshank *v.* Burrell, 18 Johns. 58.

[27] Walker *v.* Johnson, 96 U. S. (6 Otto) 424.

But see Jacobson *v.* Schiffer, 51 Misc. 54, 99 N. Y. Supp. 864, in which it was held that the burden of proving that a contract of employment was for not more than one year, was on the plaintiff; citing Kay *v.* Metropolitan St. R. Co., 163 N. Y. 447, 57 N. E. Rep. 751 and Goldstein *v.* Goldman, 74 App. Div. 356, 77 N. Y. Supp. 1127.

Similarly in an action for rent due under a lease, the burden is on the plaintiff to prove compliance with the statute requiring leases for over one year to be writing. Riviera Realty Co. *v.* Henry, 144 N. Y. Supp. 790.

"When, in a suit for specific performance of an executory contract to lease premises for a term of six years, the complaint not stating whether the agreement was oral or in writing, it was held that it was not to be presumed that the agreement rested in parol and if the defendant wished to set up the statute as a defense, he should plead it. He could not demur to the complaint on the ground that it did not state facts sufficient to constitute a cause of action." Shea *v.* Keeney, 155 App. Div. 628, 140 N. Y. Supp. 912.

[28] Wilcox Silver Plate Co. *v.*

6. Forgery.

The mode of proving handwriting has been stated.[29] It is not competent to show that the person suspected of the forgery has forged the defendant's name in other instances,[30] nor that he has been already convicted of forging the paper in suit.[31] Proof beyond reasonable doubt is not required.[32]

In rebuttal of the defense of forgery of defendant's name to an ordinary obligation to pay money, plaintiff may show that, at about its date, defendant was trying to borrow.[33]

7. Alterations.

The rule has already been stated.[34]

II. ILLEGALITY OF CONTRACT

8. General Rules.

Illegality must be pleaded, to be admissible; [35] and if the special ground is stated, other grounds not stated are inad-

Green, 9 Hun, 347, affi'd 72 N. Y. 17; Ellis *v.* Maxson, 19 Mich. 186, s. c., 2 Am. Rep. 81.

[29] Chapter XXI, paragraphs 4, etc., of this vol.

[30] Rosc. N. P. 93, citing Balcetti *v.* Serani, Peake Cas. 142; Griffiths *v.* Payne, A. & E. 131. But compare Corser *v.* Paul, 41 N. H. 24; Stratton *v.* Farwell, 10 Allen, 31, n.

[31] Castrique *v.* Imrie, L. R. H. L. 414, 434, *per* BLACKBURN, J.

[32] Chapter XXVI, paragraph 31 of this vol.; N. Y. Indemnity Co. *v.* Gleason, 7 Abb. New Cas. 334; Blaeser *v.* Milwaukee, &c. Ins. Co., 37 Wis. 31, s. c., 19 Am. Rep. 747.

[33] Stevenson *v.* Stewart, 11 Penn. St. 307. Compare Chapter XII, paragraph 21 of this vol.

But the fact that the signatures of the sureties upon a stay bond were forged and that the defendant was financially interested in having the judgment stayed does not support a finding that the defendant committed the forgery. Holloway *v.* State, 90 Ark. 123, 118 S. W. Rep. 256.

[34] Chapter XXI, paragraphs 14 and 31 and chapter XLVIII, paragraph 5 of this vol.

[35] Hayes *v.* Abramson, 97 N. Y. Supp. 371; Goss *v.* Austin, 11 Allen, 525; Rosc. N. P. 346; Milbank *v.* Jones, 127 N. Y. 370; Musser *v.* Adler, 86 Mo. 445; Mathews *v.* Leaman, 24 Ohio St. 615; Sharon *v.* Sharon, 68 Cal. 29; Buchtel *v.* Evans, 21 Ore. 309; Barber Asphalt Paving Co. *v.* Botsford, 56 Kans. 532, 542, 44 Pac. Rep. 3; Maitland *v.* Zanga, 14 Wash. 92, 44 Pac. Rep. 117. Otherwise if it appear by plain-

missible.[36] It cannot be presumed except upon clear evidence.[37] To bring a case within a statutory prohibition, defendant should produce satisfactory evidence that the facts are such as to make the statute applicable, and not leave to mere inference what should be established by proof.[38]

The usual test whether a demand connected with an illegal transaction is capable of being enforced by law is, whether

tiff's case. Russell *v.* Barton, 66 Barb. 539.

"The rule is that if a plaintiff, in order to make out his cause of action, is required to show that the contract sued upon is, for any reason, illegal, the court should not enforce it whether pleaded as a defense or not. But when the illegality does not appear from the contract itself, or from the evidence necessary to prove it, but depends upon extraneous facts, the defense is new matter and must have been pleaded in order to be available." Kansas City School Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. Rep. 656, 60 Am. St. Rep. 576, 37 L. R. A. 406.

The defence of illegality will not defeat the plaintiff unless it is pleaded, except in a case where the illegality is so flagrant as to require the court, of its own motion, on grounds of public policy to stop the proceedings. Cox *v.* Cameron Lumber Co., 39 Wash. 562, 82 Pac. Rep. 116.

The general rule of law is that a contract made in violation of a statute is void, and that, when a plaintiff cannot establish his cause of action without relying upon an illegal contract, he cannot recover. Chesapeake, etc., Co. *v.* Maysville Buck Co., 132 Ky. 643, 116 S. W. Rep. 1183.

[36] Dingeldein *v.* Third Avenue R. R. Co., 9 Bosw. 79, rev'd on another ground in 37 N. Y. 575. This rule does not bind the court to enforce an unlawful contract. If a party to an illegal agreement, by proof of part of the facts constituting the transaction out of which it grew makes a *prima facie* case for recovery against another party to the agreement, without disclosing the illegality, the defendant's guilty participation in the transaction will not preclude him from showing that illegality. Hope *v.* Linden Park, &c. Asan., 58 N. J. L. 627, 34 Atl. Rep. 1070.

A contract to "corner" the market has been held illegal and unenforcible. Wright *v.* Cudahy, 168 Ill. 86, 48 N. E. Rep. 39.

[37] Nelson *v.* Eaton, 26 N. Y. 410, s. c., 16 Abb. Pr. 113, rev'g 7 Abb. Pr. 305, and affi'g 15 How. Pr. 305. If the contract could be legally performed, an intention to do that which is a violation of the law must be shown. Waugh *v.* Morris, L. R. 8 Q. B. 202, s. c., 5 Moak's Eng. 197.

[38] Miller *v.* Roessler, 4 E. D. Smith, 234.

the plaintiff requires the aid of the illegal transaction to establish his case.[39] Mere knowledge of the other party's illegal intent is not usually enough,[40] but knowledge and giving aid is.[41] Common report is not usually competent to charge plaintiff with knowledge.[42]

Oral evidence is admissible to show an illegal intent, though it contradict the terms of a written instrument;[43] but not necessarily to show innocent intent contrary to a

[39] Holt *v.* Green, 73 Penn. St. 198, s. c., 13 Am. Rep. 737, and cases cited; Gregory *v.* Wilson, 36 N. J. (7 Vroom) 315, s. c., 13 Am. Rep. 448; Alvord *v.* Latham, 31 Barb. 294. Compare HOWE, J., Pereuilhet *v.* Hautho, 23 La. Ann. 294, s. c., 8 Am. Rep. 595.

"Where a contract not unlawful in itself has been executed, and the parties have enjoyed the benefits of the contract, the mere fact that one of the parties has violated a penal statute in the approach to the contract will not prevent a court from enforcing payment." Hayes *v.* Abramson, 97 N. Y. Supp. 371.

[40] Tracy *v.* Talmage, 14 N. Y. 162; Michael *v.* Bacon, 49 Mo. 474, s. c., 8 Am. Rep. 138; TALIAFERRO, J., Hubbard *v.* Moore, 24 La. Ann. 591, s. c., 13 Am. Rep. 128; Mahood *v.* Tealza, 26 La. Ann. 108, s. c., 21 Am. Rep. 546.

So in an action involving the legality of a lease of certain premises to be used as a bawdy-house, the lessor may enforce the lease although he may have had knowledge that the lessee intended to use the premises for such immoral purpose. This case was so decided on the theory that conducting a disorderly house is only a misdemeanor. Ashford *v.* Mace, 146 S. W. Rep. (Ark.) 474.

But knowledge that the other party intends to use the commodity or goods sold "in flagrant violation of the fundamental rights of man or of society as in cases of murder, treason or other heinous felonies that are *malum in se*, will be enough to defeat the plaintiff. Steele *v.* Curle, 4 Dana (Ky.), 381.

[41] Hull *v.* Ruggles, 56 N. Y. 424, affi'g 1 Supm. Ct. (T. & C.) 18, s. c., 65 Barb. 432; Conemaugh Brewing Co. *v.* Bennett, 60 Pa. Super. Ct. Rep. 543.

[42] Hedges *v.* Wallace, 2 Bush (Ky.), 442. Knowledge of agent held not imputable to principal. Stanley *v.* Chamberlain, 39 N. J. L. 565. Compare chapter LVI, paragraph 42 of this vol.

[43] Cassard *v.* Hinman, 1 Bosw. 207, affi'g 14 How. Pr. 84, again, 6 Bosw. 8; Sherman *v.* Wilder, 106 Mass. 537. The rule forbidding the introduction of parol evidence to contradict, add to, or vary a written instrument, does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law. Friend

writing expressing illegal intent.[44] The acts and declarations of each party, both before and after, as well as at the time of making the contract, are competent against himself on the question of intent,[45] and they may be examined as witnesses,[46] within limits already stated.[47]

The presumption that the law is known extends even to foreigners making abroad a contract to be performed within this State; [48] but not to persons, not citizens of this State, and making, without the State, a contract to be performed without it.[49] Foreign law is matter of fact to be alleged and proved.[50]

9. Compounding Felony.

It should appear, 1. That there was an agreement to compound a felony; 2. That the contract was the result of that agreement; and, 3. That the plaintiff knew of the illegal consideration at the time of making the contract.[51] The opinion of the public prosecutor, that all the evidence which the government could produce would not be sufficient to sustain the charge, is not relevant.[52]

10. Sunday Laws.

It is not enough to prove that the negotiation of the contract was made, and its terms agreed on, on Sunday, if the

v. Miller, 52 Kans. 139, 39 Am. St. Rep. 340, 34 Pac. Rep. 397.

[44] Porter *v.* Havens, 37 Barb. 343. Compare paragraph 13.

[45] Brown *v.* Brown, 34 Barb. 533; Sherman *v.* Wylder (above).

[46] See chapter XXI, paragraph 54, chapter XXXIV, paragraph 12, and chapter LIX, paragraph 15 of this vol.

[47] Chapter XXXIV, paragraph 12, and chapter LIX, paragraph 15 of this vol.

[48] Dewitt *v.* Brisbane, 16 N. Y. 508. Compare Smeltzer *v.* White, 92 U. S. (2 Otto) 390, 393.

[49] Merchants' Bank *v.* Spalding, 9 N. Y. 53, 62, affi'g 12 Barb. 302.

[50] See Thatcher *v.* Morris, 11 N. Y. 437.

[51] Earl *v.* Clute, 2 Abb. Ct. App. Dec. 1. Higgins *v.* Sowards, 159 Ky. 783, 169 S. W. Rep. 554.

[52] Bigelow *v.* Woodward, 15 Gray, 560, and see Davies *v.* London, &c. Marine Ins. Co., 38 L. T. N. S. 478. Record of acquittal not conclusive of innocence. People

contract was completed and perfected on a secular day; nor even that the instrument was executed on Sunday if it was delivered on a secular day.[53] A subsequent ratification on a secular day may be proved, even by acts, without express promise.[54] To prove a work of "necessity or charity," honest belief that a case of necessity, etc., existed, is not alone sufficient; [55] but the object of the act done being proved belief is relevant, and may go to the jury even though the ground of belief or means of knowledge have not been shown.[56] The court will take judicial notice of the coincidence of the days of the week with the days of the month.[57]

v. Buckland, 13 Wend. 592; see also chapter XLI, paragraph 12, and chapter XLIII, paragraph 20 of this vol.

[53] Lovejoy *v.* Whipple, 18 Vt. 379; Sumner *v.* Jones, 24 Id. 317, 321. So of sales and services on a secular day pursuant to a contract on Sunday. Cranson *v.* Goss, 107 Mass. 439, s. c., 9 Am. Rep. 45; Shepley *v.* Henry Siegel Co., 203 Mass. 43, 88 N. E. Rep. 1095 (involving a contract suggested on a Sunday); Hurr *v.* Nivinson, 69 Atl. Rep. (N. J.) 1094.

Evidence of a conversation which occurred on a Sunday, is admissible, if the contract was delivered on a secular day. Silver *v.* Graves, 210 Mass. 26, 95 N. E. Rep. 948.

[54] Sumner *v.* Jones (above).

A telephone conversation occurring on a Sunday cannot constitute a valid contract, but letters which are subsequently written in confirmation of such conversation and clearly indicating the terms, constitute a valid written contract. Webster Mfg. Co. *v.* Montreal River Lumber Co., 159 Wis. 456, 150 N. W. Rep. 409.

[55] Johnson *v.* Town of Irasburgh, 47 Vt. 28, s. c., 19 Am. Rep. 111.

[56] Doyle *v.* Lynn & Boston R. R. Co., 118 Mass. 195, s. c., 19 Am. Rep. 431.

[57] Wilson *v.* Van Leer, 127 Pa. St. 371, 14 Am. St. Rep. 854, 17 Atl. Rep. 1097; Philadelphia, &c. R. Co. *v.* Lehman, 56 Md. 290. "In Mackintosh *v.* Lee, 57 Iowa, 358 the mere mode of introducing the almanac seems to vary, but as all the authorities agree that no proof is necessary, it follows that it is not required to be put in evidence at all. The almanac in such cases is used, like the statutes, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury. Hence counsel may refer to an almanac, in his argument to the jury, to show that a witness has testified falsely as to a certain day of a certain week or month, although the almanac is not proved and put in evidence. State *v.* Morris, 47

11. Usury; Pleading; and Burden of Proof.

To be admissible, usury must be pleaded; [58] and a general allegation, without stating the facts relied on as constituting usury, is not enough to admit evidence of essential facts not alleged.[59] The facts alleged for this purpose must be proved as laid, or the defense fails.[60] If foreign law is relied on, both the law [61] and the facts necessary to bring the contract under foreign law [62] must be alleged, and proved. There is no

Conn. 179." Wilson *v.* Van Leer (above).

[58] Fay *v.* Grimsteed, 10 Barb. 321; Mechanics' Bank of Williamsburgh *v.* Foster, 44 Barb. 87, s. c., 19 Abb. Pr. 47, 29 How. Pr. 408; Frank *v.* Morris, 57 Ill. 138, s. c., 11 Am. Rep. 4; National L. Ins. Co. *v.* Donovan, 238 Ill. 238, 87 N. E. Rep. 356.

[59] Watson *v.* Bailey, 2 Duer, 509; Fay *v.* Grimsteed (above); Smalley *v.* Doughty, 6 Bosw. 66; Manning *v.* Tyler, 21 N. Y. 567. Compare Dagal *v.* Simmons, 23 Id. 491.

In pleading usury, "the pleader must distinctly set forth the facts constituting it, and must not only allege the elements of the contract which constitute usury, and thus violate the law, but must also show the amount of the usurious interest charged or taken." Albritton *v.* Lott-Blacksher Comm. Co., 180 Ala. 33, 60 So. Rep. 148; Ariston Realty Co. *v.* Bernstein, 111 N. Y. Supp. 538.

A mere allegation that a note is usurious, sets up a conclusion of law. King *v.* Curtin, 31 App. Cas. (D. C.) 23.

[60] Griggs *v.* Howe, 2 Abb. Ct. App. Dec. 291, affi'g 31 Barb. 100.

A usurious contract is void and cannot be divided into two contracts, one to pay principal and another to pay interest, so as to sustain the former although the latter be void. Garvin *v.* Linton, 62 Ark. 370, 35 S. W. Rep. 430, 37 S. W. Rep. 569.

A partnership contract whereby the managing partner guarantees a higher profit to the other partner than the legal rate of interest on his investment, is not usurious. Clemens *v.* Crane, 234 Ill. 215, 84 N. E. Rep. 884.

[61] Cutler *v.* Wright, 22 N. Y. 472.

Where a borrower signs and indorses notes in Pennsylvania in blank and sends them to his agent in New York who procures a loan thereon from a person in New York, the contract of loan is a New York contract and the question of usury is to be determined by New York law. Hooley *v.* Talcott, 129 App. Div. 233, 113 N. Y. Supp. 820.

A note made in Georgia and payable in Georgia, is usurious or not according to the laws of Georgia. Camp *v.* Randle, 81 Ala. 240, 2 So. Rep. 287.

[62] Dearlove *v.* Edwards, 166 Ill. 619, 46 N. E. Rep. 1081; Miller *v.* Wilson, 146 Ill. 523, 37 Am. St. Rep. 186, 34 N. E. Rep. 111; Dol-

presumption that the usury laws of this State prevail in another State or country.[63] An obligation made without the State, and not designating a place of payment, is not presumed usurious, though the rate exceeds our limit.[64] On a contract made here between persons resident here, and which would be usurious by our law, but which is to be performed in a State where it would not be usurious, intent to evade may be presumed in the absence of explanation.[65]

The affirmative of the issue is upon the defendant[66] to prove not merely an usurious intent, but facts from which usurious intent is to be deduced.[67] Evidence supporting allegations that the security sued on was given in substitution for a prior

man *v.* Cook, 14 N. J. Eq. 56. For a convenient clue to the conflicting authorities on the law of place, see Dickinson *v.* Edwards, 7 Abb. New Cas. 65, and cas. cit., and chapter XVII, paragraph 42 this vol.; Merchants' Bk. of Canada *v.* Griswold, 72 N. Y. 472, affi'g 9 Hun, 561; Cope *v.* Wheeler, 41 N. Y. 303, affi'g Cope *v.* Alden, 53 Barb. 350, s. c., 37 How. Pr. 181. The apparent conflict in the cases is reduced when it is considered that the courts lean toward sustaining a contract made without corrupt intent, if it can be sustained by the law of either place. General expressions in the opinions as to what law applies, often mean what law the court may apply in support of the contract, not what law it must apply in prohibition of it.

Whether or not the premiums charged for a loan by a savings and loan association are usurious is determined by the law of the place where the contract of loan was made. Steinman *v.* Midland Sav., etc., Co., 78 Kan. 479, 96 Pac. Rep. 860.

[63] Davis *v.* Garr, 6 N. Y. 124; Cutler *v.* Wright, 22 N. Y. 472.

" 'While executory contracts for the payment of illegal interests cannot be enforced, yet the disposition of courts at the present time is to discard the old doctrine that all usurious contracts are essentially iniquitous, and void, and to treat them as illegal only to the extent of the excessive interest, unless the statute otherwise directs.' " Craven *v.* Bates, 96 Ga. 78, 23 S. E. Rep. 202.

[64] Davis *v.* Garr (above).

[65] Berrien *v.* Wright, 26 Barb. 208.

[66] Haughwout *v.* Garrison, 69 N. Y. 339, affi'g 40 Super. Ct. (J. & S.) 550; Abbott *v.* Stone, 172 Ill. 634, 50 N. E. Rep. 328; McAleese *v.* Goodwin, 32 U. S. App. 650; 69 Fed. Rep. 759; Hudson *v.* Equitable Mortgage Co., 100 Ga. 83, 26 S. E. Rep. 75; Gens *v.* Blinder, 137 N. Y. Supp. 868; Garlick *v.* Mut. Loan, etc., Ass'n, 236 Ill. 232, 86 N. E. Rep. 236.

[67] Valentine *v.* Conner, 40 N. Y.

security of the same or less amount, and that the prior security was usurious, throws on plaintiff the burden of giving evidence to purge the new security of the presumption of usury.[68]

12. — Estoppel by Certificate, &c.

Plaintiff may exclude evidence of usury by proving that, without any notice of the facts constituting usury, he took the securities and advanced the money on the faith of defendant's affidavit or certificate that there was no defense, and that he would not have taken them had he had any notice of usury.[69] It is essential to show that the purchase was in

248; Eldridge *v.* Reed, 2 Sweeny, 155.

"The burden of proving usury is on him who asserts it, by a preponderance of the evidence, but, as it works a forfeiture, the evidence should be scrutinized with more strictness than in ordinary civil actions" (citing cases). Temple *v.* Davis, 115 Minn. 328, 132 N. W. Rep. 257.

See also Gage *v.* J. F. Smyth Mercantile Co., 160 Fed. Rep. 425, 87 C. C. A. 377, and Norton *v.* Nathanson, 85 N. J. Eq. 409, 97 Atl. Rep. 166, for a discussion as to what circumstances will render a contract usurious.

"It is a just requirement that all the facts constituting the usury should be proved with reasonable certainty, and that they shall not be established by mere surmise and conjecture, or by inferences entirely uncertain." White *v.* Benjamin, 138 N. Y. 623, 33 N. E. Rep. 1037.

[68] Stanley *v.* Whitney, 47 Barb. 586.

"It is true that if, after a usurious transaction has been completely settled and closed, a new loan is made, the borrower will not be allowed to set up the usury in the former transaction against the new loan. Usury in one transaction cannot be availed of in another. But settlement and agreement upon the amount due and the giving of a new note do not preclude the defense of usury existing in the original transaction." Cobe *v.* Guyer, 237 Ill. 568, at page 573, 86 N. E. Rep. 1088.

[69] Mason *v.* Anthony, 3 Abb. Ct. App. Dec. 207; Smith *v.* Lombardo, 15 Hun, 415, 417; Dinkelspiel *v.* Franklin, 7 Hun, 339, 340.

"It seems to me that the doctrine of estoppel which prevents a party to a contract from coming into court and seeking to have the court place a different construction upon his contract from that which he has placed upon it by his continuous actions and conduct, and thereby prejudice the rights of the other contracting party, should not

reliance [70] on a certificate or affidavit which had already been made.[71] A certificate may be rebutted by evidence that it was fraudulently obtained; but not by evidence of negligent signing while ignorant.[72] Oral representations are equally competent.[73] Representations by the maker do not estop the payee.[74] Representations by the payee do not estop the maker.[75] A guaranty of payment does not estop; [76] nor does accepting a conveyance of the equity of redemption; [77] but assuming payment on receiving a conveyance does.[78]

13. — Oral Evidence.

The fact that the contract is in writing does not exclude oral evidence to show that though apparently innocent it was usurious; [79] or, though apparently usurious, it was innocent.[80]

be applied to prevent the enforcement of the usury statute." Ford *v.* Washington Nat. Bldg. & Loan Inv. Ass'n, 10 Ida. 30, 76 Pac. Rep. 1010, 109 Am. St. Rep. 192.

[70] Wilcox *v.* Howell, 44 N. Y. 398, affi'g 44 Barb. 396.

[71] Payne *v.* Burnham, 62 N. Y. 69, rev'g 2 Hun, 143, s. c., 4 Supm. Ct. (T. & C.) 678.

[72] Dinkelspiel *v.* Franklin, 7 Hun, 339, affi'g 72 N. Y. 108, see also chapter XXI, paragraph 104 of this vol. and cases cited.

[73] Am. L. Ins. & Trust Co. *v.* Bayard, 5 N. Y. Leg. Obs. 13; Ferguson *v.* Hamilton, 35 Barb. 427; and see Ahern *v.* Goodspeed, 9 Hun, 263; Benedict *v.* Caffe, 5 Duer, 226; Robbins *v.* Richardson, 2 Bosw. 248; Adams *v.* Blancan, 6 Robt. 334; Cain *v.* Bonner (Tex. Civ. A.), 149 S. W. Rep. 702.

[74] Hackley *v.* Sprague, 10 Wend. 114.

[75] Dowe *v.* Schutt, 2 Den. 621.

[76] Tiedemann *v.* Ackerman, 16 Hun, 307.

[77] Brooks *v.* Avery, 4 N. Y. 225.

[78] Murray *v.* Barney, 34 Barb. 336. Compare Berdan *v.* Sedgwick, 44 N. Y. 626, affi'g 40 Barb. 359.

[79] Koehler *v.* Dodge, 31 Neb. 328, 28 Am. St. Rep. 518, 47 N. W. Rep. 913; Rohan *v.* Hanson, 11 Cush. 44. In an action on a note providing on its face for a legal rate

[80] Hollenbeck *v.* Shutts, 1 Gray, 431, 2 Whart. Ev., § 1044; Shoop *v.* Clark, 4 Abb. Ct. App. Dec. 235.

"The conditions, covenants and recitals of any and all instruments under which usury is hidden may be contradicted, impeached and assailed by evidence, parol or written, in order to disclose the real facts, and uncover the usury." Seekel *v.* Norman, 71 Iowa, 264, 32 N. W. Rep. 334.

14. — Variance.

A substantial variance as to the rate exacted,[81] or as to the ground or pretext on which it was exacted,[82] is material, and fatal, if plaintiff was misled to his predjudice; otherwise not.[83]

15. — Intent.

The intent which is essential, is not intent to violate the statute,[84] but intent to take more than the rate fixed, and this is to be deduced from the facts.[85] The evidence must

of interest, parol evidence of a contemporaneous verbal agreement to pay a legal rate of interest is admissible to show the illegality of the note. Roe *v.* Kiser, 62 Ark. 92, 34 S. W. Rep. 534. Where notes bear lawful interest upon their face it is necessary to overcome this written evidence and the legal presumption that the parties to them have not violated the law, in order to establish the charge of usury, and this requires strong proof. McAleese *v.* Goodwin, 32 U. S. App. 650, 69 Fed. Rep. 759. The instrument is innocent and valid on its face, and it is only by resort to extrinsic facts and circumstances that it is invested with the elements of illegality, and such facts are capable of an innocent construction, the intention of the payee of the note in the transaction is a material element in determining whether the facts should be given that construction, and may be testified to by him. Davis *v.* Marvine, 160 N. Y. 269; Campbell *v.* Connable, 98 N. Y. Supp. 231; Ringer *v.* Virgin Timber Co., 213 Fed. Rep. 1001; Fellows *v.* Christensen, 28 S. D. 353, 133 N. W. Rep. 814; Grayson *v.* Brooks, 64 Miss. 410, 1 So. Rep. 482.

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[81] Griggs *v.* Howe, 2 Abb. Ct. App. Dec. 291, affi'g 31 Barb. 100; Frank *v.* Morris, 57 Ill. 138, s. c., 11 Am. Rep. 4; Wheaton *v.* Voorhis, 53 How. Pr. 319.

[82] Gasper *v.* Adams, 28 Barb. 441; Brown *v.* Champlin, 66 N. Y. 214, 219.

The usurious contract must be specifically set out in the answer and proved as pleaded, but to hold that a defendant must prove the contract in the very words in which it is laid would, in effect, be a prohibition of the defense. Cox *v.* Westcoat, 29 N. J. Eq. 551.

[83] Catlin *v.* Gunter, 11 N. Y. 368, s. c., 10 How. Pr. 315, rev'g 1 Duer, 253; Duel *v.* Spence, 1 Abb. Ct. App. Dec. 559; Katz *v.* Kuhn, 9 Daly (N. Y.), 166.

[84] And ignorance of the statute is not material. Bank of Salina *v.* Alvord, 31 N. Y. 473.

[85] Fiedler *v.* Darrin, 50 N. Y. 437, rev'g 59 Barb. 651; and see 58 N. Y. 308.

A usurious contract to pay a

sustain an inference that both parties were cognizant of the facts essential to usury,[86] and that there was intent, both on the part of the lender[87] and of the borrower.[88] But it need not be shown that the intent was communicated.[89] Each party may be compelled to testify to his intent,[90] except in those jurisdictions where, as in New York, usury is indictable, and there the privilege[91] is a protection, not only to a party[92] but to an agent[93] in the usurious transaction.

Where the facts are such that the question of legality depends upon intent, a party may be allowed to testify, even in his own favor, whether he intended to take or pay usury,[94] but not whether it was his understanding that the other intended to take usury, for this is only an inference.[95] If the

pre-existing debt, while itself void, does not effect the validity of the pre-existing debt. Garvin *v.* Linton, 62 Ark. 370, 35 S. W. Rep. 430, 37 S. W. Rep. 569.

[86] Powell *v.* Jones, 44 Barb. 521.

[87] Woodruff *v.* Hurson, 32 Barb. 557.

Where the lender falsely represents to the borrower that a certain sum has been incurred by the lender as an expense in procuring the money, and the borrower assents to its allowance under the belief that it was so incurred, such sum does not constitute usury, there being no agreement to pay this sum for the loan. Morton *v.* Thurber, 85 N. Y. 550.

[88] Keyes *v.* Moultrie, 3 Bosw. 1. But see Milwaukee First Nat. Bank *v.* Plankinton, 27 Wis. 177, 9 Am. Rep. 453.

[89] Ayrault *v.* Chamberlain, 33 Barb. 229.

[90] See, as to proving intent, chapter XVI, paragraph 59 and chapter XXXIV, paragraphs 8 and 12 of this vol.

[91] For the rule as to privilege, see chapter XXXIV, paragraph 12 of this vol.

[92] Fellows *v.* Wilson, 31 Barb. 162. But the court may require a party sworn in his own behalf on an issue of usury, to answer whether he is not under indictment for usury. Southworth *v.* Bennett, 58 N. Y. 659.

[93] Curtis *v.* Knox, 2 Den. 341; Henry *v.* Salina Bank, 1 N. Y. 83, affi'g 2 Den. 155, Vilas *v.* Jones, 1 N. Y. 274.

[94] Black *v.* Ryder, 5 Daly, 304.

It seems to be "well settled that the purchase in good faith of an existing mortgage at a discount is not violative of the statute against usury." Schanz *v.* Sotscheck, 86 Misc. 121, 149 N. Y. Supp. 145.

[95] Central Bank *v.* St. John, 17 Wis. 157; Hogg *v.* Ruffner, 1 Black, 115. Compare Burt *v.* Gwinn, 4 Har. & J. (Md.) 507, 517.

Where, in addition to paying

facts proved constitute usury, testimony to innocent intent cannot sustain a finding that there was no usury;[96] and if the facts do not constitute usury, intent is not material.[97]

Reservation of interest in excess of the legal limit is presumptive, but not conclusive,[98] evidence of usury. Slight excess may be explained by evidence of mistake or inadvertence.[99] The mere fact that the lender reserved part of the consideration,[1] or that the security reserved interest for a term anterior to its date,[2] is not sufficient to establish usury.

A subsequent payment of a bonus, in addition to legal interest, will, without direct evidence of agreement, sustain a finding of original agreement to pay it.[3]

Evidence of usury in former dealings of the parties is not enough;[4] but a general arrangement for usurious accommodations, under which the loan in question was made is;[5] and

back the principal, with interest, the borrower stipulates for the payment of an additional benefit depending upon a contingency, and beyond the legal rate, the contract is usurious. Hungerford Brass, etc., Co. *v.* Brigham, 47 Misc. 240, 95 N. Y. Supp. 867.

[96] Austin *v.* Walker, 45 Iowa, 527.

[97] Smith *v.* Paton, 31 N. Y. 56, affi'g 6 Bosw. 145.

On the other hand, although the transaction seems to be innocent, such as a sale of stock with an option to repurchase, it may be shown that the intent was to loan money at an illegal rate. Phillips *v.* Mason, 66 Hun, 580, 21 N. Y. Supp. 842.

[98] Archibald *v.* Thomas, 3 Cow. 284.

[99] Marvine *v.* Hymers, 12 N. Y. 223. Compare Utica Ins. Co. *v.* Tilman, 1 Wend. 555.

[1] Booth *v.* Swezey, 8 N. Y. 276. The fact that the borrower gave temporary credit without interest, for part of the loan, does not necessarily prove usury, but may be explained. Brown *v.* Champlin, 66 N. Y. 214, 219.

The fact that the lender accepted from the broker a part of his commission does not make the transactions usurious. Wheaton *v.* Voorhis, 53 How. Pr. 319.

[2] Marvin *v.* Feeter, 8 Wend. 532. Unless it is shown affirmatively that the lender did not provide the money on the day of date, and hold it in readiness. Dowdall *v.* Lenox, 2 Edw. 267.

[3] Catlin *v.* Gunter, 11 N. Y. 368, s. c., 10 How. Pr. 315, rev'g 1 Duer, 253.

[4] Brinckerhoof *v.* Foote, Hoffm. 291; Ross *v.* Ackerman, 46 N. Y. 210; Jackson *v.* Smith, 7 Cow. 717.

[5] Keutgen *v.* Parks, 2 Sandf. 60.

a series of loans, each followed by the voluntary payment of a usurious bonus, is competent on the question of intent.[6]

16. — Covers for Usury.

If a contract is not necessarily usurious the burden is on defendant to prove the guilty intent, and that the contract was a cover for usury and for the loan of money upon usury,[7] and that the parties had knowledge of the facts constituting the usury.[8] On these questions circumstantial evidence is freely received.[9]

Evidence of usage cannot be received to justify a transaction otherwise usurious.[10] Profitableness of selling exchange cannot be assumed without proof; [11] but if profitableness is shown, evidence that buying exchange was exacted as a condition of the loan, proves usury.[12] If the bank was entitled to reserve for exchange, defendant must prove the current rate of exchange in order to show the excess of legal interest.[13]

[6] Storer *v.* Coe, 2 Bosw. 661.

[7] Matthews *v.* Coe, 70 N. Y. 239, 242; Lynn *v.* McCue, 94 Kan. 761, 147 Pac. Rep. 808.

[8] Thomas *v.* Murray, 32 N. Y. 605, rev'g 34 Barb. 157; Valentine *v.* Conner, 40 N. Y. 248.

Where A advances money to B and takes B's note at an excessive rate of interest together with B's order on his employer to pay A a stated amount each week from B's salary, the transaction constitutes a usurious loan and not a purchase by A of B's wages. A. R. King & Co. *v.* Cantrell, 3 Ga. App. 263, 61 S. E. Rep. 144.

[9] See Quackenbos *v.* Sayer, 62 N. Y. 344, affi'g 4 Supm. Ct. (T. & C.) 424, s. c., 2 Hun, 157; Knick. L. Ins. Co. *v.* Nelson, 7 Abb. New Cas. 170, affi'g 13 Hun, 321.

[10] Dunham *v.* Gould, 16 Johns. 367, affi'g as Dunham *v.* Dey, 13 Id. 40; Bank of Utica *v.* Wager, 2 Cow. 712; Pratt *v.* Adams, 7 Paige, 615.

[11] Murray *v.* Barney, 34 Barb. 336.

[12] Marvine *v.* Hymers, 12 N. Y. 223; International Bk. *v.* Bradley, 19 N. Y. 245.

A sale of stock to a person under an agreement to re-buy at the price paid plus a sum equal to more than the legal rate of interest, if the buyer wished to sell, is not necessarily usurious; but it may be shown that the real interest of the parties was to borrow and lend money and that this device of sale was merely a cover for the usurious transaction. Phillips *v.* Mason, 66 Hun, 580, 21 N. Y. Supp. 842.

[13] Wheeler *v.* National Bank, 96 U. S. (6 Otto) 268.

To show that commissions charged for advances in the course of business were usury, the burden is on defendant to give some evidence showing them to be unusually high.[14] The court cannot take judicial notice of the usual rate, nor determine it by reference to adjudications in reported cases between strangers.[15] Where the lender made a charge for expenses, the facts of necessary labor and inconvenience, and the state of health affected thereby, and the fact that the money was previously safely invested, if shown to have been communicated to the borrower as the lender's reasons for the charge, are competent in the lender's behalf; and so is the testimony of the lender that the reservation was intended as compensation for trouble and expense, and not for the loan.[16]

17. — Act of Agent or Co-Trustee.

If the principal did not take usury nor know of its being taken, evidence that his agent, without sanction from him, exacted a bonus upon the pretense that it was for the principal, does not prove usury,[17] even though the borrower believed the agent was dealing with him as a principal.[18]

[14] Seymour *v.* Marvin, 11 Barb. 80, 87.

Proof of the fact that the amount actually received by the borrower is considerably less than the amount he agrees to repay is not, of itself, sufficient to give rise to the presumption of usury. But if defendant can show that the excess represented more than lawful charges, the case is otherwise. Wilkins *v.* Gibson, 113 Ga. 31, 38 S. E. Rep. 374, 84 Am. St. Rep. 204.

[15] Id.

[16] Thurston *v.* Cornell, 38 N. Y. 281, s. c., 7 Transc. App. 258.

[17] Estevez *v.* Purdy, 66 N. Y. 446, rev'g 6 Hun, 46. See conflicting cases in 29 Am. Rep. 70, note; Brown *v.* Jones, 89 Misc. 538, 152 N. Y. Supp. 571; Boardman *v.* Taylor, 66 Ga. 638; Franzen *v.* Hammond, 136 Wis. 239, 116 N. W. Rep. 169, 128 Am. St. Rep. 1079, 19 L. R. A. N. S. 399.

[18] Lee *v.* Chadsey, 3 Abb. Ct. App. Dec. 43.

"There can be no doubt that when one negotiates a loan through a third party, with a money lender, and the latter, *bona fide*, lends the money at a legal rate of interest, the contract is not made usurious merely by the fact that the intermediary charges the borrower with a heavy commission; the intermediary having no legal or estab-

The burden is upon defendant to establish that the creditor was a party to the agreement for the bonus, or accepted the benefit of it.[19] If he accepted it, direct evidence that he knew that it came from the borrower is not essential.[20]

Where one of several trustees is shown to have exacted a bonus, the burden is on defendant to show sanction by the others.[21]

Election to ratify usury will not generally be presumed without evidence.[22]

lished connection with the lender, as agent." "But when a lender authorizes his agent to make loans for him under a general arrangement that he must look to the borrower for his compensation, and such agent for the lender effects a loan, and charges the borrower a commission, this will make the contract usurious, whether the lender knew of the charge or not." Whaley *v.* American Freehold Land Mortgage Co., 74 Fed. Rep. 73, 20 C. C. A. 306.

Proof of payment of a sum of money exceeding the legal rate of interest to a party undertaking, for a consideration, to procure a note to be discounted does not show a usurious exaction by the party discounting the note. Baldwin *v.* Doying, 114 N. Y. 452, 21 N. E. Rep. 1007.

[19] Guardian Mut. L. Ins. Co. *v.* Kashaw, 66 N. Y. 544, 547, rev'g 3 Hun, 616. The presumption is that an agency comprehends the doing of only lawful things, and the law will always assume that an illegal act, as, for example, accepting usury, was done without the principal's authority or consent. Barger *v.* Taylor, 30 Oregon, 228, 42 Pac. Rep. 615, 47 Pac. Rep. 618.

Where the principals entrusted the entire management of their business to a cashier as their general agent, and in exacting a "bonus" the cashier did not assume to do so on his own account, but for his principals, and in the line of his employment, and included the bonus in the amount of the notes taken in the name of his principals, the notes were usurious in the hands of the principals, even if the cashier in exacting usury disobeyed their positive instructions. Stephens *v.* Olson, 62 Minn. 295, 64 N. W. Rep. 898.

[20] Earle *v.* Hammond, 2 Abb. N. C. 368.

The fact that money brokers, without the knowledge or authority of the lender, exacted commissions from the borrower beyond the legal rate of interest, will not make the loan usurious. Carden *v.* Short (Tex.), 31 S. W. Rep. 246.

[21] Van Wyck *v.* Walters, 16 Hun, 209; Stout *v.* Rider, 12 Hun, 574.

[22] Brackett *v.* Barney, 28 N. Y. 333.

18. — Inception.

Where original want of consideration and usurious transfer in inception is alleged, the question whether the obligation had inception before its transfer depends on whether the transferor could have sued on it.[23] Evidence that there had been no intent to deliver and no delivery in fact, is enough on this point.[24] One who takes a note at its inception at a greater discount than the legal rate, must be conclusively presumed to have intended to loan, as the transaction can have no other character. His want of knowledge that the note takes its inception in his hands, is immaterial.[25]

19. — Declarations and Admissions.

Oral evidence is admissible to show that one security was given and accepted in payment of or substitution for another,[26] and for this purpose it is not essential to produce the other,[27] unless some question arises on its contents. Declarations and admissions of the party are admissible in favor of the declarant or his principal, if part of the *res gestæ*.[28] The rules as to accounts, memoranda and entries in the course of business, have been already stated.[29]

III. INCAPACITY OF CONTRACTING PARTY

20. Infancy.

Infancy, to be admissible, must be pleaded.[30] It may be proved in the modes stated in Chapter V. A complaint on

[23] Eastman *v.* Shaw, 65 N. Y. 522, 527.

[24] Id., 529.

[25] Id., 530.

[26] Gilbert *v.* Duncan, 29 N. J. L. (5 Dutch.) 133; Duncan *v.* Gilbert, Id. 521.

[27] Id.

[28] Ripley *v.* Mason, Hill & D. Supp. 66. Declarations to a stranger after the bargain was concluded, and on the evening of the same day, no part of the *res gestæ*. Smith *v.* Webb, 1 Barb. 230.

[29] Chapter XVI, paragraphs 35, etc., of this vol. For instances of their application, see Bank of Utica *v.* Hillard, 5 Cow. 153; see, also, Id. 419; Churchman *v.* Lewis, 34 N. Y. 444; East River Bank *v.* Hoyt, 32 N. Y. 119, rev'g 41 Barb. 441; Bank of Monroe *v.* Culver, 2 Hill, 531.

[30] Moak's Van Santv. Pl. 363.

contract does not admit a recovery for damages on evidence of defendant's fraud in falsely representing that he was of age.[31] The burden is on a defendant pleading infancy by a foreign law, to allege and prove the foreign law;[32] but the court may presume that the law of a sister State is the same as the common law.[33]

21. — New Promise: Admissions and Declarations.

A new promise is admissible in rebuttal, though not alleged.[34] Otherwise of a promise to pay something else by way of compromise.[35] If the issue is upon a new promise after defendant came of age, an express promise must be established, unless the demand is for necessaries.[36] An explicit acknowledgment may be such as to sustain a finding of an express promise.[37] The ratification should be a promise

Contra, at common law. Wailing *v.* Toll, 9 Johns. 141. Infancy at time of suit, as ground of abatement, is not matter for evidence at the trial. The remedy is by preliminary motion. Treadwell *v.* Bruder, 3 E. D. Smith, 596; Goodwine *v.* Acton, 97 Ill. App. 11.

[31] Studwell *v.* Shapter, 54 N. Y. 249. Nor does an allegation of the false representation in the reply. Brown *v.* McCune, 5 Sandf. 224.

"The two or three who were minors when they subscribed can have no relief in this litigation because, though becoming adults during its progress or before, they have not personally pleaded their infancy." Chicago Bldg. &c. Mfg. Co. *v.* Higginbotham (Miss.), 29 So. Rep. 79.

[32] Thompson *v.* Ketcham, 8 Johns. 189.

[33] Holmes *v.* Mallett, 1 Morris, 82.

[34] Esselstyn *v.* Weeks, 12 N. Y. 635; Dusenbury *v.* Hoyt, 53 Id. 521.

[35] Bliss *v.* Perryman, 2 Ill. (1 Scam.) 484.

[36] Gay *v.* Ballou, 4 Wend. 403; Millard *v.* Hewlett, 19 Wend. 301.

The mere silence of an infant after coming of age does not show a ratification of a contract made during his minority. He must either expressly or by some act ratify it. Tyler *v.* Gallop, 68 Mich. 185, 35 N. W. Rep. 902, 13 Am. St. Rep. 336.

But ratification of the contract of an infant after he becomes of age may be found from the fact that he kept the consideration for a reasonably long time after reaching his majority; but the burden is on the other party to show the facts constituting ratification. Southern Cotton Oil Co. *v.* Dukes, 121 Ga. 787, 49 S. E. Rep. 788.

[37] Bank of Silver Creek *v.* Browning, 16 Abb. Pr. 272.

to a party in interest or his agent, or an explicit admission of an existing liability from which a promise may be implied. It must be equivalent to a new contract; [38] and it will sustain the action, although the original demand has been barred by the statute.[39] In the absence of evidence to the contrary, an adult,[40] making such a promise, may be presumed to have known the law and the facts necessary to establish his exemption from legal liability.[41]

If the demand is for necessaries,[42] the burden is on the defendant to show that during minority he was properly supplied by parent or guardian, if he rely on that.[43]

For the purpose of showing what the original transaction was, the acts, declarations, and admissions of defendant, though made before he came of age, are competent against him.[44] Those of his parent or guardian, as to his liability, are not.[45]

22. Insanity.

A denial of the making or delivering of the contract does not admit evidence of defendant's unsoundness of mind in

[38] Goodsell *v.* Myers, 3 Wend. 479.

[39] Halsey *v.* Reid, 4 Hun, 777.

[40] When to a plea of infancy plaintiff replied and proved a new promise; *held*, that the burden was on the defendant to prove he was still an infant, when he made it. Bigelow *v.* Grannis, 4 Hill, 206; Bay *v.* Gunn, 1 Den. 108; and see Hartley *v.* Wharton, 11 Adol. & E. 934.

[41] Taft *v.* Sergeant, 18 Barb. 320. *Contra*, Ewell's Cas. 29. See, also, Rawley *v.* Rawley, 17 Moak's Eng. 121, n.; Ring *v.* Jamison, 2 Mo. App. 584; Comey *v.* Harris, 133 App. Div. 686, 118 N. Y. Supp. 244.

[42] See Chapter VI, paragraph 23 of this vol.

[43] Parsons *v.* Keys, 43 Tex. 557. Since an infant's clothes are classed as necessaries, the burden is upon the infant to prove that clothes sold to him were not necessary to him at the time. Lynch *v.* Johnson, 109 Mich. 640, 67 N. W. Rep. 908.

[44] Haile *v.* Lillie, 3 Hill, 149; Ackerman *v.* Runyon, 3 Abb. Pr. 111, s. c., 1 Hilt. 169.

[45] Whart. Ev., § 1208.

"It is an established rule that a guardian *ad litem* cannot admit or waive anything adverse or prejudicial to the infant, and has no power to bind his ward by the ad-

making and delivering.[46] An allegation of unsoundness, coupled with a denial of having authorized any person to make the contract, and of the making of such a contract, only puts sanity in issue. The burden to establish insanity is on the defendant. But he is not competent to testify that he was not of sound mind at the time of the transaction or at the date of the contract.[47] The presumptions and modes of proof are the same as in an action to rescind.[48]

mission or waiver of anything." Mote *v.* Morton, 52 Fla. 548, 41 So. Rep. 607.

[46] Dearmond *v.* Dearmond, 12 Ind. 455.

"No contract of a person *non compos mentis*, in whatever form it may be put, whether in that of a promissory note or otherwise, can, on account of his want of capacity to make a valid execution of it, so import a consideration as to cast upon him the burden of proving a want of consideration, in an action brought upon it, or dispense with proof of an adequate consideration to support it as against him or his representative." Hosler *v.* Beard, 54 Ohio St. 398, 409, 43 N. E. Rep. 1040.

The subsequent insanity of the maker of a note cannot be made a defense. Kansas City School Dist. *v.* Sheidley, 138 Mo. 672, 40 S. W. Rep. 656, 60 Am. St. Rep. 576, 37 L. R. A. 406.

[47] O'Connell *v.* Beecher, 21 App. Div. (N. Y.) 298, 300; Dorchester *v.* Dorchester, 50 Hun, 600, 3 N. Y. Supp. 238.

[48] See chapter L, paragraph 3 of this vol. For the mode of proving what are necessaries, see chapter VI, paragraph 23 of this vol.

CHAPTER LX

PAYMENT OR OTHER DISCHARGE

I. PAYMENT.

1. Pleading; and burden of proof.
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6. — from possession of security, &c.
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8. — to executors, trustees, &c.
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11. — by check or draft.
12. — by note, &c., of debtor or third person.
13. — by obligation of joint debtor, &c.
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15. Payment of collateral.
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17. Part payment, in full.
18. Admissions; entries and memoranda.
19. Possession of instrument; indorsements.
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I. PAYMENT — *continued*.

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25. Presumption of payment from lapse of time.

II. ACCORD AND SATISFACTION.

26. Mode of proof, and effect.

III. ACCOUNT STATED.

27. Mode of proof, and effect.

IV. COMPROMISE AND COMPOSITION.

28. Mode of proof, and effect.

V. TENDER.

29. Necessity, and mode of proof.

VI. RELEASE.

30. Mode of proof, and effect.
31. Oral evidence.
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VII. SURETYSHIP AND MODIFICATION OF CONTRACT.

33. Defendant a surety.
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VIII. DISCHARGE.

35. In bankruptcy.
36. — impeaching.
37. In insolvency.
38. New promise.

I. PAYMENT

1. Pleading; and Burden of Proof.

Payment [49] is not admissible in evidence unless pleaded.[50] But it is not necessary to state the particular manner in

[49] Even though after the commencement of the action. Hawes *v.* Woolcock, 30 Wis. 213.

[50] Harvey *v.* Denver, etc., R. R. Co., 44 Colo. 258, 99 Pac. Rep. 31, 130 Am. St. Rep. 120; Simons *v.* Martin, etc., Co., 25 Misc. 788, 54 N. Y. Supp. 560; Forbes *v.* Wheeler, 39 Misc. 538, 80 N. Y. Supp. 538; Ashland Land, etc., Co. *v.* May, 51 Neb. 474, 71 N. W. Rep. 67; Anston Realty Co. *v.* Bernstein, 111 N. Y. Supp. 538; Gardner *v.* Avery Mfg. Co., 117 Wis. 487, 94 N. W. Rep. 292; Glickman *v.* Loew, 20 Misc. 401, 45 N. Y. Supp. 1040; Geo. A. Fuller Co. *v.* Manhattan Const. Co., 44 Misc. 219, 88 N. Y. Supp. 1049; Rogers *v.* Simonson & Son Co., 45 Misc. 323, 90 N. Y. Supp. 298; State *v.* Quillen (Tex. Civ. App.), 115 S. W. Rep. 660; Tilt-Kenney Shoe Co. *v.* Hoggarty, 43 Tex. Civ. App. 335, 114 S. W. Rep. 386; Rosentsock *v.* Dessar, 85 App. Div. 501, 83 N. Y. Supp. 334; Lord *v.* Graveson, 26 Ohio Cir. Ct. 371; Ashland Land, &c. Co. *v.* May, 51 Neb. 474, 71 N. W. Rep. 67; Greenl. Ev. 473, § 516; Baker *v.* Kistler, 13 Ind. 63. Except, perhaps, where the complaint is a mere general allegation of indebtedness. Marley *v.* Smith, 4 Kans. 183. Even part payment is not admissible in mitigation, unless pleaded (McKyring *v.* Bull, 16 N. Y. 297), and may not be available though proved by plaintiff (Seward *v.* Torrence, 5 Supm. Ct. [T. & C.] 323), unless the existence of some payment is conceded by the complaint. Quin *v.* Lloyd, 41 N. Y. 349, rev'g 1 Sweeny, 253. But a specific denial of a specific allegation of non-payment, may be equivalent to an allegation of payment. Van Giesen *v.* Van Giesen, 10 N. Y. 316, affi'g 12 Barb. 520.

Unless the defense of payment is pleaded, the defendant should not even be allowed to prove payment by the plaintiff's own admissions. Hander *v.* Baade, 16 Tex. Civ. App. 119, 40 S. W. Rep. 422.

But the following may be noted in connection with the text rule:

While it is generally true that a defense of payment is inadmissible under a general denial, this is not so when the fact of non-payment is alleged in the complaint as a necessary and material fact to constitute a cause of action. It is always competent to prove under a general denial any facts tending to controvert the material affirmative allegations. Knapp *v.* Roche, 94 N. Y. 329; State *v.* Peterson, 142 Mo. 526, 39 S. W. Rep. 453, 40 S. W. Rep. 1094.

"Evidence of payment before

which the obligation was extinguished.[51] A defendant pleading payment, or tender and readiness to pay, has the burden

action brought was proper under the general issue in either assumpsit or debt at common law, and it has not been suggested that it is otherwise under the new general rules of the Supreme Court of this State. The rationale of admitting evidence of payment is that it disproves a subsisting debt or legal liability and so disproves the contract which rests upon such debt or liability as its moving consideration." Axel *v.* Kraemer, 75 N. J. L. 688, 70 Atl. Rep. 367.

Under a plea of non-assumpsit a defendant is entitled to prove payment and generally anything which shows that *ex aequo et bono*, the plaintiff ought not to recover. O'Brien *v.* O'Brien, 75 Ill. App. 263.

Payment need not be pleaded where the matter relied upon constitutes a set-off. Ruzeoski *v.* Wilrodt (Tex. Civ. App.), 94 S. W. Rep. 142.

Where there is something in the complaint from which payment can be found or inferred as a legal conclusion, payment need not be specially pleaded as a defense. Stalker *v.* Hayes, 81 Conn. 711, 71 Atl. Rep. 1099.

[51] McLaughlin *v.* Webster, 141 N. Y. 76, 83, 35 N. E. Rep. 1081. "Any valuable consideration moving from the debtor to the creditor which the parties agree shall operate to satisfy the debt will be given that effect, in the absence of fraud or mistake, especially in the case of debts unsettled and unliquidated. When parties agree that a debt shall be deemed paid and satisfied by a provision in favor of the creditor in a will, and that provision is made and the creditor has received the benefit of it, I see no reason to doubt that the facts may be shown under a pleading alleging payment or satisfaction generally." (Id.)

Payment is the material allegation, not the date or dates upon which payment was made. Under a general allegation of payment without stating to whom the payment was made, from whom a receipt was taken, and the time when the payment was made and the receipt taken, proof that the payment was made to the proper person and in the amount due is proper. Keys *v.* Fink, 81 Nebr. 571, 116 N. W. Rep. 162. But see Groves *v.* Sexton, 5 Ga. App. 160, 62 S. E. Rep. 731, where it is said that a plea of payment which fails to allege when, by whom and where payment was made is insufficient.

The plea should in any case be such as to give the plaintiff notice of the nature of the claim relied upon. Arnold *v.* Cole, 42 W. Va. 663, 26 S. E. Rep. 312.

Payment may be found by the jury from the facts and circumstances although there is no direct evidence to that effect. Sheldon *v.* Heaton, 22 App. Div. 308, 47 N. Y. Supp. 1124.

In an action of debt "no account

of proof.[52] And if the payments pleaded are specified, evidence of other payments is not admissible [53] without amendment.

A general allegation of payment admits evidence of payment in cash or in any other mode,[54] and by any

of payments need be filed to admit proof of general payments." Lawson *v.* Zinn, 48 W. Va. 312, 37 S. E. Rep. 612.

[52] North Pennsylvania R. R. Co. *v.* Adams, 54 Penn. St. 94; Gernon *v.* McCan, 23 La. Ann. 84; Willis *v.* Holmes, 28 Ore. 265, 42 Pac. Rep. 989; Lakeside Press, &c. Co. *v.* Campbell, 39 Fla. 523, 22 So. Rep. 878; Lerche *v.* Brasher, 104 N. Y. 157, 161, 10 N. E. Rep. 58.

See Ashland Land, etc., Co. *v.* May, 51 Neb. 474, 71 N. W. Rep. 67.

In an action on an account where the defendant put in an answer of payment, it is error to charge that the plaintiff must prove that the amount owing or some part thereof was due and unpaid. Gas Belt Torpedo Co. *v.* Ward, 43 Ind. A. 537, 87 N. E. Rep. 1110.

Where the defense made by the defendant in replevin was that certain mules, first loaned to him by the plaintiff, were afterwards sold to him by the plaintiff in consideration of services rendered, it was held that such defense was practically that of payment and that the burden of proof was upon the defendant. Stewart *v.* Graham, 93 Miss. 251, 46 So. Rep. 245.

Where the cause of action is founded upon a breach of the defendant's contract to pay on demand, the complaint is insufficient in substance where it does not contain an averment of demand and non-payment. Smith *v.* State Bank, 61 Misc. 647, 114 N. Y. Supp. 56.

[53] Hoddy *v.* Osborn, 9 Iowa, 517; Brown *v.* Ginn, 19 Ohio Cir. Ct. Rep. 660.

Evidence of the payment of a copartnership note held by a bank by the acceptance of the individual note of one of the members of the firm, is not admissible under a special plea of payment by the deposit of money which was received and accepted by the bank as payment. Shakopee First Nat. Bank *v.* Strait, 71 Minn. 69, 73 N. W. Rep. 645.

[54] Farmers' & Citizens' Bank *v.* Sherman, 33 N. Y. 69, affi'g 6 Bosw. 181; Moorehouse *v.* Northrop, 33 Conn. 380. But see Bagby *v.* Hudson, 11 Ky. Law Rep. 581.

Under a general plea of payment, money or something valuable accepted in lieu of it may be proved. Mitchell *v.* Conrad, 15 Del. 417, 41 Atl. Rep. 77.

Under a plea of payment evidence may be given of payment in money or in any other mode agreed upon by the parties, provided it is an executed transaction, and in case of goods and chattels there must be delivery by the debtor and an acceptance by the creditor so as

agency,[55-56] which in law amounts to satisfaction by the transfer of an equivalent; but not other modes of avoidance,[57] such as taking other security and releasing it again, to defendant's prejudice;[58] nor a set-off.[59]

Under an allegation of payment a guarantor or surety may show any specific payment or even an appropriation by the principal of property accepted in payment by the creditor, but not a set-off or counter-claim in favor of the principal,

to pass title to the property, which must be accepted in discharge of the debt. Edgerton *v.* West, 43 Fla. 133, 30 So. Rep. 797.

Payment in its broadest sense is giving something either in money, property or right, or performing some service. It is an impossibility for a debtor to discharge a debt by gift, for if he gives anything in discharge of a debt it is not a donation, but a payment. White *v.* Black, 115 Mo. App. 28, 90 S. W. Rep. 1153.

In an action for services, evidence that the defendant furnished the plaintiff with supplies, produce, etc., for his use during the term of service, is admissible under a general plea of payment. Stirna *v.* Bepabe, 42 N. Y. Supp. 614, 11 App. Div. 206.

[55-56] Wolcott *v.* Smith, 15 Gray, 537. Thus the fact of the delivery of property on an agreement to sell and apply the proceeds to payment, &c., is admissible. Ruggles *v.* Gatton, 50 Ill. 412. So is an account stated between plaintiff and defendant and payment of the balance. Rosc. N. P. 655, citing Callander *v.* Howard, 10 C. B. 290, L. J. 19 C. P. 312.

In an action against a railroad by its president for back salary, the defendant upon a plea of payment may show that the plaintiff directed the secretary and treasurer of the company to collect his salary from the railroad and apply it on an amount which he owed said secretary and treasurer. Such testimony unimpeached and uncontradicted would sustain the plea of payment. Talbotton Railroad Co. *v.* Gibson, 106 Ga. 229, 32 S. E. Rep. 151.

[57] Walters *v.* Washington Ins. Co., 1 Iowa, 404, 409.

[58] Harley *v.* Kirlin, 45 Penn. St. 49, 58.

So it has been held that a special plea of payment did not admit proof of a gift to the defendant as evidenced by a receipt. White *v.* Black, 115 Mo. App. 28, 90 S. W. Rep. 1153.

"An assignment of a claim by a creditor to the debtor is, . . . a settlement and payment of the claim." Dial *v.* Inland Logging Co., 52 Wash. 81, 100 Pac. Rep. 157.

[59] Green *v.* Storm, 3 Sand. Ch. 305.

except under circumstances appealing to the equitable consideration of the court.[60]

2. Oral Evidence; Res Gestæ.

Payment[61] in money may be proved by an eye-witness, without producing or accounting for a receipt passed,[62] but the receipt is then competent as part of the *res gestæ*.[63] A receipt for other property in payment, if such as to embody a contract, should be produced or accounted for.[64] Delivery of money, without more, is presumed to be in payment of some debt. The rule as to declarations and admissions of agents has been already stated.[65]

In applying the rule of the *res gestæ*,[66] declarations and

[60] Coe *v.* Cassidy, 6 Daly, 242, and cases cited.

In an action on a note the trial court properly struck out a plea which alleged payment but set out a sale of merchandise to the plaintiff and an amount due from the plaintiff for the said merchandise since "the plea was manifestly one of set-off and not of payment." Northington *v.* Granade, 118 Ga. 584, 45 S. E. Rep. 447. See also San Antonio & Gulf Shore Const. Co. *v.* Davis, 48 S. W. Rep. (Tex. Civ. App.) 754.

Where the answer denies that the debt sued on ever existed, but contains no allegation of payment, evidence showing that an assignment of the note in question was made to and accepted by the defendant as part payment of an indebtedness due to him from the plaintiff, is admissible. Craddock *v.* Godding, 10 Colo. App. 115, 50 Pac. Rep. 369.

[61] Even of a judgment (Vidiclir *v.* Cousin, 6 La. Ann. 489), or a mortgage (Mauzey *v.* Bowen, 8 Ind. 193).

A commission merchant or broker who is employed to buy stock or grain is presumed to have authority to make all payments required by the rules of the exchange. Perin *v.* Parker, 25 Ill. App. 465, aff'd 126 Ill. 201, 18 N. E. Rep. 747, 9 Am. St. Rep. 571, 2 L. R. A. 336.

[62] Keene *v.* Meade, 3 Pet. 1, 7, affi'g Meade *v.* Keene, 3 Cranch C. Ct. 51. Except, perhaps, in the case of payments to public officers required by law to give receipts. See chapter XIII, paragraph 14 of this vol.

[63] Van Keuren *v.* Corkins, 66 N. Y. 77.

[64] See Townsend *v.* Atwater, 5 Day, 298.

[65] Chapter III, paragraph 55, chapter XII, paragraph 7, chapter XV, paragraph 5 and chapter XXVI, paragraph 5 of this vol. Jenks *v.* Burr, 56 Ill. 450.

[66] See chapter III, paragraph 51, chapter XII, paragraph 16 and

entries made at the time and place of paying and before the transaction is fully closed and other scenes intervene—as, for instance, a request for and refusal of a receipt with the reason given,[67] are competent; but previous declarations to a third person, of intent to obtain money for the purpose of paying,[68] or declarations to a third person after sending money, of having sent a certain amount,[69] are not. The rule of the *res gestæ* admits declarations and entries not brought to the knowledge of the party against whom they are offered, if offered, not to show the fact of payment, but the party's intention or application of a payment, the fact of payment and mutuality of intent being otherwise proved.[70]

3. Authority to Pay.

Authority of the person paying need not be proved.[71]

4. Agent's Authority to Receive.[72]

In respect to a debt, due in the ordinary course of business, evidence of payment made during business hours to one found in plaintiff's counting-room, apparently intrusted with the conduct of business there, is sufficient,[73] and is ordinarily conclusive.[74]

chapter XIII, paragraph 18 of this vol., and Strange *v.* Donohue, 4 Ind. 327.

[67] Fifield *v.* Richardson, 34 Vt. 410, 418.

[68] Crounse *v.* Fitch, 1 Abb. Ct. App. Dec. 475, and see Wilson *v.* Pope, 37 Barb. 321.

[69] Young *v.* Commonwealth, 28 Pa. St. 501, 504.

[70] This I deem the sound rule, though some authorities seem adverse. See chapter XII, paragraph 16 and chapter XIII, paragraph 18 of this vol.

[71] Sanford *v.* McLean, 3 Paige, 117, and see Tacey *v.* Irwin, 18 Wall. 549, 551, 9 Id. 326; Gernon *v.* McCan, 23 La. Ann. 84. Otherwise, if he did not pay in satisfaction, or the payment was revoked. Rosc. N. P. 658, 659.

[72] For other rules as to evidence of authority to receive payment, see chapter XII, paragraph 7, chapter XIII, paragraph 5, chapter XV, paragraph 5 and chapter XXVI, paragraph 5 of this vol.

[73] Barrett *v.* Deere, M. & M. 200, Ld. TENTERDEN, C. J.

It was proper to allow a witness to state that upon an examination of the books of a bank, he found

[74] Barrett *v.* Deere (above), Rosc. N. P. 657.

An agent's authority to receive, even payments expressly stipulated to be paid to the principal, may be shown by evidence of recognition by the principal.[75] But special authority in each case is not evidence of general authority.[76] Evidence of the principal's admission that the

that no payment had been made, where he first testified that he was cashier of the bank, that he had been bookkeeper at the time of the alleged payment, that he made all entries of money received in the said books and that at the time of the transaction he had been asked to examine the books and ascertain whether the payment in controversy had been made. Woods *v.* Hamilton, 39 Kan. 69, 17 Pac. Rep. 335.

[75] Bronson's Exr. *v.* Chappell, 12 Wall. 681, 683.

The plaintiff's intestate leased a field of the defendant on which he pastured the cattle of third persons under a contract to care for such cattle. The owners of the cattle paid the defendant and though this payment did not in itself relieve them of their liability to the plaintiff, yet when the plaintiff sued the defendant to recover the excess collected over the sum claimed for rental of the field, it was held this was such a ratification of the unauthorized act of the defendant as to absolve the owners of their responsibility to the plaintiff. Homire *v.* Rodgers, 74 Iowa, 395, 37 N. W. Rep. 972.

When the evidence showed that certain parties were clearly agents to negotiate a sale of land but it did not appear that such agents were authorized to receive payment therefor, the fact that a payment was made to them and that the principal acknowledged and appropriated it with full knowledge of the facts, was held to be a sufficient ratification to entitle the plaintiff to recover from the principal for breach of the contract to convey. Payne *v.* Hackney, 84 Minn. 195, 87 N. W. Rep. 608.

[76] Smith *v.* Kidd, 68 N. Y. 130, 138.

When a claim is placed in the hands of an attorney for collection, authority to accept the full amount of the claim only is conferred upon him. Kaiser *v.* Hancock, 106 Ga. 217, 32 S. E. Rep. 123.

An attorney charged with the collection of a claim is a special agent for that purpose only and as such cannot settle the claim for a sum less than the face thereof without authority to make such compromise. Sonnebom *v.* Moore, 105 Ga. 497, 30 S. E. Rep. 947.

Express authority from the assignee of a mortgage to the mortgagee to receive one payment on account of the principal of the mortgage did not establish the general authority of such mortgagee to receive further payments as agent of the assignee. Bacon

money was properly paid to the alleged agent is primary and sufficient evidence of the agent's authority.[77] Recognition of the payment by receiving the money from one assuming to be an agent without authority, is not recognition of his authority to give a receipt in full, or an admission that no more was due than was paid.[78] In an action against an individual, evidence that he had a partner interested in the contract sued on, lets in a receipt proven to have been signed by the partner in the firm name.[79] Payment to one of several joint creditors may be proved if he was the agent of the others.[80] Off-setting the debt against

v. Pomeroy, 118 Mich. 145, 74 N. W. Rep. 324.

Where the plaintiff's agent, with selling powers only, sold goods to the defendants and received their note for the purchase price, the fact that he subsequently received several payments on account which was in his possession and credited the same on the back thereof, was not, it was held, evidence that he had special authority to receive anything other than money in payment of the balance due. Walton Guano Co. *v.* McCall, 111 Ga. 114, 36 S. E. Rep. 469.

[77] Doyle *v.* St. James Church, 7 Wend. 178.

The owner of a note placed it in the hands of an attorney who secured a new note in exchange therefor. Thereafter the attorney received payments on account of interest and principal which the owner received and credited upon the note. Ostensible authority was held to have been thereby conferred upon the attorney sufficient to relieve the maker from a second liability for the final payment made to the attorney. Quinn *v.* Dresback, 75 Cal. 159, 16 Pac. Rep. 762, 7 Am. St. Rep. 138.

[78] Sewanee Mining Co. *v.* Best, 3 Head (Tenn.), 701.

[79] Shepard *v.* Ward, 8 Wend. 542.

Nor even where an agent has been expressly recognized by the principal by giving him authority to "accept, receive and receipt for" the amount "due" from the debtor, and "to do and perform . . . whatsoever (was) requisite and necessary to be done," did the agent have authority to accept a part payment of the debt in full settlement thereof. Murphy *v.* Kastner, 50 N. J. Eq. 214, 24 Atl. Rep. 564.

Likewise, an agent who has been intrusted with the collection of a check has no authority to receive a partial payment only, unless express authority thereto is shown. Lowenstein *v.* Bresler, 109 Ala. 326, 19 So. Rep. 860.

[80] Wright *v.* Ware, 58 Geo. 150;

an agent's indebtedness is not payment,[81] even though good faith appear.[82]

5. — Presumed from Agency in Sale.

An agent selling for an unknown principal is presumed to have authority to receive payment of the price.[83]

One selling for a known principal is not presumed, from that fact alone, to have authority to receive payment [84] unless

and see chapter VII, paragraph 6, of this vol., and as to partners, chapter IX, paragraphs 32, etc., and Homer *v.* Wood, 11 Cush. 62.

Similarly, a payment of a mortgage debt to one of two joint mortgagees discharged the debtor's obligation. The court said: "The rule is, payment to one of two joint payees extinguishes the debt." Lyman *v.* Gedney, 114 Ill. 388, 406, 29 N. E. Rep. 282, 55 Am. Rep. 871.

[81] Henry *v.* Marvin, 3 E. D. Smith, 71; Pearson *v.* Scott, 38 L. T. R. N. S. 747. See also Parker *v.* Leech, 76 Neb. 135, 107 N. W. Rep. 217.

An agent with authority to sell or trade property cannot receive part of the selling price in cash and accept a cancellation of a debt which he owed the vendee in satisfaction of the balance. Hodgson *v.* Raphael, 105 Ga. 480, 30 S. E. Rep. 416.

Nor could the defendants cancel a note held by the principal by selling property to the latter's agent for the agent's own use, in the absence of a ratification by the principal or express authority of the agent to so receive it. Walton Guano Co. *v.* McCall, 111 Ga. 114, 36 S. E. Rep. 469.

[82] Underwood *v.* Nicholls, 17 C. B. 239.

[83] Henry *v.* Marvin (above).

The authority of an agent to receive payment of a note and to enter satisfaction for a mortgage securing the loan for which the notes were given, was held to be strongly evidenced by the fact that the principal was undisclosed and that he had authorized the agent to make the loan, accept the note and a mortgage securing it all in his own name and had also permitted the agent to collect the interest thereon. Cheshire Provident Inst. *v.* Vandegrift, 1 Nebr. (Unoff.) 339, 95 N. W. Rep. 615.

And an undisclosed principal was not permitted to collect from one who had engaged and paid another for work done, believing that he was dealing with the latter as a principal and without knowledge that he was in fact the agent of an undisclosed principal. Shine *v.* Kennealy, 102 Ill. App. 473.

[84] Higgins *v.* Moore, 34 N. Y. 417, rev'g 6 Bosw. 344. See also Dec. Dig., Vol. 16, Principal & Agent, § 105 (4).

he is permitted and able to deliver the thing sold, in which case his authority must be presumed, in the absence of evidence to the contrary.[85] Such authority cannot be presumed for the purpose of a payment before due.[86] A local usage, allowing mere selling brokers to receive payment, is not admissible for the purpose of showing authority in the broker to receive such payment.[87]

6. — From Possession of Security, &c.

Possession of a negotiable security drawn or indorsed so as to be in effect payable to bearer is presumptive evidence of authority to receive payment. Mere possession of a negotiable security so expressed or indorsed as to be payable to another than the possessor,[88] or of a non-negotiable se-

"An agency to sell does not necessarily carry with it the authority to collect." Walton Guano Co. *v.* McCall, 111 Ga. 114, 36 S. E. Rep. 469.

If an agent merely solicits orders for goods and sends them to his principal to be filled, he has no implied authority to receive a payment for the same such as will relieve the vendee of his obligation to the principal for the purchase price. Clark *v.* Murphy, 164 Mass. 490, 41 N. E. Rep. 674.

Where an agent does not have possession of the goods which he sells and is, in fact, only authorized to sell, a vendee makes payment to him at his own risk and has the burden of proving the agent's authority to receive such payment. John Hutchinson Mfg. Co. *v.* Henry, 44 Mo. App. 263.

[85] Whiton *v.* Spring, 74 N. Y. 169.

It is a general rule that an agent in possession of his principal's goods, with authority to sell, has an implied authority to receive payment therefor. Bailey *v.* Pardridge, 134 Ill. 188, 27 N. E. Rep. 89.

When an owner of goods puts them in the hands of an agent to sell, he thus clothes the agent with ostensible authority not only to sell them but also to receive payment, even though the payment be in property rather than in cash. John Hutchinson Mfg. Co. *v.* Henry, 44 Mo. App. 263.

[86] Id. *Contra*, Rosc. N. P. 657.

It seems, however, that a general agent with power to sell stock has also the authority to receive payment for the same, "either before or after delivery." Sawin *v.* Union Bldg., etc., Ass'n, 95 Iowa, 477, 483, 64 N. W. Rep. 401.

[87] Higgins *v.* Moore (above); Pearson *v.* Scott, 38 L. T. R. N. S. 747.

[88] Doubleday *v.* Kress, 50 N. Y. 410, rev'g 60 Barb. 181. *Contra*,

curity, such as a bond and mortgage,[89] is not alone sufficient to authorize an inference of authority. Possession, together with the fact that the one in possession originally took the security for the owner, or negotiated and made the loan for which the security was taken, and was thereafter intrusted by the owner with its possession, is sufficient.[90] In such cases it is incumbent upon the debtor who makes payments to the agent, to show that the securities were in his possession on each occasion when the payments relied on were made.[91]

The presumption of authority terminates upon the principal's death.[92] Without the custody of the obligation, neither

see 2 Greenl. Ev. (13th ed.) 52.

[89] Id., Smith *v.* Kidd, 68 N. Y. 130, 137.

"A mortgagor who makes a payment to one other than the mortgagee, does so at his peril." Crane *v.* Gruenewald, 120 N. Y. 274, 24 N. E. Rep. 456, 17 Am. St. Rep. 643.

Mere possession of a bond and mortgage by an assignor thereof does not imply an authority to receive payments therefor after maturity. Hoffman *v.* Froma Realty Co., 153 App. Div. 770, 138 N. Y. Supp. 935.

[90] Doubleday *v.* Kress (above).

"Where an agent who negotiates a loan for his principal is allowed to retain possession and control of the security taken on the loan, he has apparent authority after maturity to receive payments for his principal." Central Trust Co. *v.* Folsom, 167 N. Y. 285, 288, 60 N. E. Rep. 599.

The authority of an agent to receive payments on a loan "may be inferred from his having made the loan and retained the securities, but this inference is founded on his custody of the notes and ceases when they are withdrawn." Garrels *v.* Morton, 26 Ill. App. 433.

And it was held that where an attorney had negotiated a mortgage, the mortgagor could properly pay him part of the principal without seeing the security, when the attorney told the debtor that he held it, which as a matter of fact was the case. Crane *v.* Gruenewald, 120 N. Y. 274. See also Hoffman *v.* Froma Realty Co., 153 App. Div. 770, 138 N. Y. S. 935.

[91] Smith *v.* Kidd, 68 N. Y. 130, 137.

Where a debtor when sued on his notes claims that he has paid the agent of the plaintiff who negotiated the loan, he has the burden of proving that such agent had the custody of the securities at the time the payments were made to him. Garrels *v.* Morton, 26 Ill. App. 433.

[92] Megary *v.* Funtis, 5 Sandf. 376.

the fact that the assumed agent was the one through whom the loan was made or the security taken, nor the fact that he had usually been employed in the receipt of money for the creditor, is sufficient evidence of authority.[93] Possession, with authority to receive interest, does not imply authority to receive principal.[94] Authority to receive payment does not authorize the agent to receive it before it is due.[95] Authority to examine title does not imply authority to receive money to pay off liens.[96] Authority to foreclose

Though payments to an agent during the lifetime of the principal would have been binding upon the latter, yet a payment to an agent subsequent to the death of his principal did not avail the payor, even though he was ignorant of the death of the principal. Long *v.* Thayer, 150 U. S. 520, 14 S. Ct. 189, 37 L. ed. 1167.

[93] Id., 139; Rosc. N. P. 657. See also Bromley *v.* Lathrop, 105 Mich. 492, 63 N. W. Rep. 510.

"The inference that an agent is authorized to collect a written security for a debt because it is in his possession, ceases when the security is withdrawn by the creditor; and this even though the debt has been contracted through the agent." Guilford *v.* Stacer, 53 Ga. 618.

Even though manufacturers of farm machinery were accustomed to allow their local agents to take notes in payment of machinery sold and on the maturity thereof returned the notes to the local agents to obtain payment thereof, nevertheless it was held that the burden was upon a party who had paid a local agent to show the authority of the latter to receive payment of a particular note which was not at the time in the agent's possession. Rhodes *v.* Belchee, 36 Ore. 141, 59 Pac. Rep. 117, 1119.

[94] Doubleday *v.* Kress, 50 N. Y. 410, rev'g 60 Barb. 181.

Express authority of an agent to collect interest on a security is not sufficient authority to collect the principal, and the possession of the securities is indispensable to the agent's right to receive payment of the latter. Garrels *v.* Morton, 26 Ill. App. 433.

[95] Smith *v.* Kidd, 68 N. Y. 130, 141; Thornton *v.* Lawther, 169 Ill. 228, 48 N. E. Rep. 412.

Nor does authority to collect the interest and principal of a mortgage carry authority to collect either before they become due. Park *v.* Cross, 76 Minn. 187, 78 N. W. Rep. 1107, 77 Am. St. Rep. 630.

See Smith *v.* Hall, 19 Ill. App. 17, as to the effect of a known usage of trade, course of business or habit of dealing between the parties as extending the authority of the agent and validating his acts.

[96] Josephthal *v.* Heyman, 2 Abb. N. C. 22.

does not imply authority to receive part payment nor to receive and collect notes on time.[97]

7. Payment to Assignor.

If an assignment of a mortgage remain unrecorded, a payment on account meanwhile to the assignor may be proved; and the fact that the payment was in advance, or that the debtor did not call for production of the securities, is not evidence of bad faith.[98] In case of a final satisfaction, the omission to call for the securities is a suspicious circumstance which requires evidence that the payment was made under misrepresentation, or other evidence of good faith.[99]

[97] Heyman *v.* Beringer, 1 Abb. N. C. 315. According to some authorities the implied powers of an attorney for a non-resident and absent creditor, are more extensive than those implied in other cases. See Glass *v.* Thompson, 9 B. Monr. (Ky.) 235; Hopkins *v.* Willard, 14 Vt. 474; Kimball *v.* Perry, 15 Id. 414; Heyman *v.* Beringer, 1 Abb. N. C. 315, 316, note.

The evidence showed that the mortgagor tendered the balance due on his debt to one who was sent by the mortgagee to foreclose the mortgage. The court held that the mortgagor could not establish his case by this fact alone but must also show the authority of the mortgagee's agent to accept payment. Bacon *v.* Hooker, 173 Mass. 554, 54 N. E. Rep. 253.

[98] Van Keuren *v.* Corkins, 66 N. Y. 77.

When one made a final payment in satisfaction of a bond and mortgage but did not take a satisfaction or require the party receiving such payment to produce the instruments or account for their nonproduction, it was held that he could not urge such payment against the claims of an assignee for value under an assignment which had not been recorded. But where the payment made is partial only and not final, the one making such payment need not always require the production of the bond. Assets Realization Co. *v.* Clark, 205 N. Y. 105, 98 N. E. Rep. 457, 41 L. R. A. N. S. 462.

[99] Brown *v.* Blydenburgh, 7 N. Y. 141, and see Purdy *v.* Huntington, 42 Id. 334; Foster *v.* Beals, 21 Id. 247; Kellogg *v.* Smith, 26 Id. 18, and page 14 of this vol.

One who makes a final payment in satisfaction of a bond and mortgage and who does not either require the satisfaction or the production of the bond and mortgage, makes such payment subject to the claims of an assignee for value even though the assignment is unrecorded. Assets Realization Co. *v.* Clark, 205 N. Y. 105, 98 N. E. Rep. 457, 41 L. R. A. N. S. 462.

8. — to Executors, Trustees, &c.

Evidence of a payment to one of several co-executors or co-administrators, and a release, receipt, satisfaction piece or the like executed by one, are competent against the estate.[1] Otherwise of co-trustees.[2]

In case of payment to an executor, administrator or other trustee, evidence that it was made actually and in good faith, and that the trustee was authorized to receive it, is sufficient without evidence as to the application of the moneys.[3] In case of payment on a written security, it is not necessary to show that the trustee indorsed the payment on the bond, or paid the money to the *cestui que* trust.[4]

9. — to Sheriff.

A debtor who has paid the debt to the sheriff, upon an execution against his creditor, cannot, when the creditor

[1] An attorney, retained by one of several executors, collected interest on a bond and mortgage which the executors held for the estate, and asserted a lien for services performed. The executor acknowledged this lien and the collection by the attorney for the estate and it was held that his action in so doing was sufficient to bind the estate. Arkenburgh *v.* Arkenburgh, 27 Misc. 760, 59 N. Y. Supp. 612.

[2] As to payments to and receipts by other trustees, see chapter XI, paragraph 3 and paragraph 30 of this chapter.

[3] N. Y. Real Property Law, § 108; Champlin *v.* Haight, 10 Paige, 274.

When a testator has expressly conferred upon his executor the right to sell property to obtain funds sufficient to satisfy the debts of the estate, it is presumed, at least *prima facie*, that there were debts owing by the estate so that a purchaser of property from the executor did not have the burden of proving that there were such debts in order to validate a sale to himself. Terrell *v.* McCown, 91 Tex. 231, 43 S. W. Rep. 2.

One who had purchased a mortgage from an executor having full power under the decedent's will to sell the same, "was not answerable to any one for the proper appropriation of the money" which she had paid to the executor. In re Cochrane, 202 Pa. St. 415, 51 Atl. Rep. 989.

[4] Hadley *v.* Chapin, 11 Paige, 1 245.

A gift of property to a trustee "to take charge of, manage and control for the use and benefit" of certain parties with power "to sell and dispose" thereof for the

sues him, prove the payment merely by the sheriff's receipt and the execution. He must prove the judgment by the record; the transcript from the office of the clerk of a county in which the judgment-roll was not filed, is not sufficient.[5] The mere issue and delivery of an execution, is not, *prima facie*, evidence of the payment of the judgment on which it is issued.[6] A levy on land raises no presumption of satisfaction of the judgment. A levy on chattels is presumptive evidence of satisfaction only when the execution has been so used as to change the title of the goods, or in some way to deprive the debtor of his property.[7] The seizure by the sheriff, upon attachment, of goods sufficient to pay the judgment is not, alone, presumed to be satisfaction. The burden is on the debtor to show the application of the goods to the judgment.[8]

10. Payment by Mail.

The burden of proof of payment of a debt, is not sustained by proof that a letter, even though registered,[9] containing the requisite amount, directed to the creditor, was duly deposited in the post office.[10] The debtor must also either show that

benefit of the said parties, was held to empower such trustee to mortgage the premises, and the mortgagee was not obliged to see that the trustee made proper application of the proceeds. Ely *v.* Pike, 115 Ill. App. 284.

[5] Handly *v.* Greene, 15 Barb. 601. Compare N. Y. Code Civ. Pro., § 2446. As to payment on attachment at suit of a third person, compare Ross *v.* Pitts, 39 Ala. N. S. 606, and Flanagan *v.* Mechanics' Bank, 54 Penn. St. 398.

[6] Runyan *v.* Weir, 8 N. J. L. (3 Hals.) 286.

[7] United States *v.* Dashiel, 3 Wall. 688, and cases cited.

[8] Maxwell *v.* Stewart, 22 Wall. 77.

[9] First Nat. Bank of Bellefonte *v.* McManigle, 69 Penn. St. 156, s. c., 8 Am. Rep. 236.

[10] Gurney *v.* Howe, 9 Gray, 404, 407; Crane *v.* Pratt, 12 Gray (Mass.), 348.

Where it is claimed that payment was made by mail, the evidence is insufficient to raise a presumption that the payments were ever received if there is nothing to show that the letters in question were duly deposited in the United States mail box, or post office, enclosed in a securely sealed wrapper, addressed to the creditor, at his place of residence, and that the postage thereon was duly paid, or that the same ever came into his

the creditor authorized this mode of remittance, by express assent or direction, or a usage and course of dealing from which such assent or direction may be fairly inferred—in which case due mailing is conclusive [11]—or he must give evidence of circumstances tending to show receipt by the creditor, in which case the question may go to the jury.[12] Evidence that in a previous instance money was sent by mail without objection, is not enough to show authority, nor is a mere letter by mail requesting a remittance.[13] The post

hands. Barnes *v.* Courtright, 37 Misc. 60, 74 N. Y. S. 203.

[11] Gurney *v.* Howe (above).

"The burden of proof to show payment of a debt is not sustained by proof that a letter containing the requisite amount was duly deposited in the post office. The debtor must go farther. He must show that the creditor authorized this mode of remittance, either by express assent or direction, or by usage and course of dealing from which such assent may be fairly inferred." Fleming & Ayerst Co. *v.* Evans, 9 Kan. App. 858, 61 Pac. Rep. 503.

"A remittance by the post is good if ordered or requested, or if warranted by the course of business." Boyd *v.* Reed, 6 Heisk. (Tenn.) 631. Where the evidence showed that the plaintiff had sent a writ together with the fees for service to an officer, and subsequently, on recovery of judgment, had sent an execution to the same officer with directions to collect and remit, it was held that this evidence was sufficient to prove that the officer had been authorized to send the money collected by mail. Morgan *v.* Richardson, 13 Allen (Mass.), 410.

When a party claimed that he had paid a debt before it was due or a demand for its payment had been made by placing currency in an unregistered letter and mailing it at a rural post office, these facts were insufficient to establish a payment since there was no evidence that he was authorized to remit in this manner or at the time he claimed to have done so. Garr *v.* Taylor, 128 Iowa, 636, 105 N. W. Rep. 125.

[12] First Nat. Bank of Bellefonte *v.* McManigle, 69 Penn. St. 156, s. c., 8 Am. Rep. 236; Waydell *v.* Velie, 1 Bradf. 277.

Though a letter properly stamped, addressed and deposited in the post office is *prima facie* evidence that the addressee received it, yet evidence that the letter was stamped and contained only the name of the party to whom it was intended to be sent and the address "Chicago, Ill."

[13] Burr *v.* Sickles, 17 Ark. 428; Morton *v.* Morris, 31 Geo. 378. But see Townsend *v.* Henry, 9 Rich. (S. C.) 318.

master's entries are competent as tending to show the receipt of a registered letter,[14] but are not conclusive,[15] even as to date.[16]

11. — By Check or Draft.

A check or draft drawn by defendant,[17] payable to the order of the plaintiff, and shown to have been paid by the bank or drawee to the plaintiff; or indorsed by him and shown to have been paid, without other evidence that it was paid to him; is presumptive evidence of payment of the amount by defendant to plaintiff, without evidence that plaintiff received the paper from defendant.[18] If the paper was payable to bearer, it must be shown that it was delivered to plaintiff, or that he received the money or value on it.[19] Payment of money being thus shown, it is presumed to have been in satisfaction of an existing debt; [20] and in the absence

was held insufficient to warrant a jury in finding that the addressee had actually received it. Fleming & Ayerst Co. *v.* Evans, 9 Kan. App. 858, 61 Pac. Rep. 503.

[14] Gurney *v.* Howe (above).

[15] Dunlop *v.* Munroe, 7 Cranch, 242, 270, affi'g 1 Cranch C. Ct. 536.

[16] Gurney *v.* Howe (above).

[17] So of a check made by his wife and indorsed by him. Murphy *v.* Brick, 33 Penn. St. 235.

[18] Mountford *v.* Harper, 16 M. & W. 825; Egg *v.* Barnett. 3 Esp 196. *Contra*, Bunting *v.* Allen, 18 N. J. L. 299, unsound because payment without more is presumed to be in satisfaction of debt.

In an action for the value of goods sold and delivered, the defendant who claims payment by check has the burden of showing that "the checks were duly endorsed by the plaintiff, or his authorized agent, and the proceeds paid to him." Dowdall *v.* Borgfeldt & Co., 113 N. Y. Supp. 1069.

[19] Lowe *v.* McClery, 3 Cranch C. Ct. 254, p. 301 of this vol.

But the issuance of a township warrant for the amount of a debt owing by the township, does not amount to a payment of the account, and is not even *prima facie* evidence of payment. Mitchelltree School Township *v.* Carnahan, 42 Ind. A. 473, 84 N. E. Rep. 520.

[20] Masser *v.* Bowen, 29 Penn. St. 128.

A check which "recited on its face that it was in payment of royalties in full to date," is *prima facie* evidence of the payment and of all the facts therein recited, and when the party endorses and cashes it he makes it, with all its recitals, his contract. Gregg *v.* Roaring Springs Land, etc., Co., 97 Mo. App. 44, 70 S. W. Rep. 920.

of other proof may be presumed to apply to a debt of the same amount, in suit.[21] Mere delivery of a check,[22] does not operate as payment of a previous debt, and a receipt given on such delivery, acknowledging the receipt of money, if given by mere agents for collection, adds nothing to the effect of such delivery, and is open to parol evidence as to its real import.[23] If defendant relies upon laches of his creditor in demanding payment or giving notice of dishonor of a check given by the debtor in payment, the burden of proof is on the defendant to show such laches.[24] In the absence of express agreement, a check though drawn by the debtor in lieu of money at the request of the creditor and delivered in exchange for a receipt of payment, does not amount to payment, unless the check is actually paid or clearly would have been paid if duly presented. If remaining unpaid it is not enough for the debtor to show that it might probably have been collected.[25] If the draft or check of the debtor, drawn on a third person, is expressly received in full payment, the burden is on the plaintiff to show diligence in obtaining payment, and if not paid, notice of non-payment; or he must

[21] Murphy *v.* Brick, 33 Id. 235.

[22] Unless drawn upon the creditors themselves. Pratt *v.* Foote, 9 N. Y. 463; Comm'l Bk. of Pennsylvania *v.* Union Bk. of N. Y., 11 N. Y. 203.

A payment by check is not absolute but conditional only in the absence of a contrary agreement. Goodall *v.* Norton, 88 Minn. 1, 92 N. W. Rep. 445.

The same is true of an order. J. Weller Co. *v.* Washington Gordon, etc., Co., 24 Oh. Cir. Ct. 407.

[23] Bradford *v.* Fox, 38 N. Y. 289, rev'g 16 Abb. Pr. 51, s. c., 39 Barb. 203, s. p., Taylor *v.* Wilson, 11 Metc. (Mass.) 44.

But where a payment is made upon a debt by check, and the creditor agrees to credit the amount thereof, the burden is on him to show that the check was returned, or that it was not paid on due presentment. Goodall *v.* Norton, 88 Minn. 1, 92 N. W. Rep. 445.

The burden is upon the one claiming payment by check or order to show that such a paper was accepted in absolute payment and discharge of the debt if such is his condition. J. Weller Co. *v.* Washington Gordon, etc., Co., 24 Ohio Circuit Ct. R. 407.

[24] Id.

[25] Syracuse, &c. R. R. Co. *v.* Collins, 1 Abb. New Cas. 47.

excuse the non-presentment and produce the bill on the trial to be cancelled.[26] Other rules as to proving payment of negotiable paper,[27] or by the delivery and acceptance of negotiable paper,[28] have been already stated.

12. — By Note, &c., of Debtor, or Third Person.

Defendant, in proving the debt to have been paid by the transfer of securities need not produce the securities,[29] unless he desires to show their contents or tenor.

Negotiable paper of the debtor,[30] or of his agent,[31] or of

[26] Dayton *v.* Trull, 23 Wend. 345.

Where a bank receives a draft from a depositor, forwards it to an out of town bank for collection and upon receipt of advice from such bank that it has received the drawee's check in payment, credits its depositor with the amount in his pass book, the intention is evinced by the bank to consider the draft paid, and upon the failure of its agent to collect the check it may not charge the amount to its depositor. Kirkham *v.* Bank of America, 165 N. Y. 132, 58 N. E. Rep. 753, 80 Am. St. Rep. 714.

[27] Chapter XXI, paragraph 110 of this vol.

[28] Chapter XVI, paragraph 47 of this vol.

[29] Daniel *v.* Johnson, 29 Geo. 207; Morrison *v.* Myers, 11 Iowa, 538.

[30] The Kimball, 3 Wall. 37; U. S. *v.* Hegeman, 204 Pa. 438, 54 A. 344, but see Allen *v.* Hudson, 78 Ill. App. 376. Acceptance of the debtors' non-negotiable promise does not even suspend the remedy unless it is founded upon a new consideration. Geller *v.* Seixas, 4 Abb. Pr. 103.

"The general rule is that the giving of a note or bill does not raise the presumption of payment. But in Maine, Massachusetts, Vermont and Indiana it is held that the presumption of payment arises from giving negotiable paper. This presumption, however, may be rebutted." 35 L. R. A. N. S. p. 98. See cases digested there.

"A debtor's giving to his creditor a promissory note, not governed by the law merchant, affords no evidence that it was offered and accepted as payment; and . . . the giving of a promissory note, governed by the law merchant, is

[31] Chapter XVI, paragraph 47 of this vol.

Where an agent bought goods for his principal and gave his personal note in payment therefor, this note did not constitute an absolute payment releasing the principal. Keller *v.* Singleton, 69 Ga. 703. See also Kruse *v.* Seiffert & Weise Lumber Co., 108 Iowa, 352, 79 N. W. Rep. 118.

either of several joint-debtors,[32] or the negotiable paper of any other person,[33] or a draft or order of the debtor on a third person,[34] taken for an antecedent debt,[35] is presumed

prima facie evidence of payment, which must be accepted as conclusive in the absence of any evidence that such was not the intention of the parties." Bradway *v.* Groenendyke, 153 Ind. 508, 55 N. E. Rep. 434.

"A negotiable promissory note, given for a simple contract debt, is *prima facie* to be deemed a payment or satisfaction of such debt as between the parties thereto, which simply means, that without further evidence of intent than the giving and receiving of such note, it is construed to be payment. Equally well settled is the rule that this presumption of payment, which is a presumption of fact may be rebutted by evidence showing a contrary intention." Spitz *v.* Morse, 104 Me. 447, 72 A. Rep. 178.

"The presumption, which prevails in this State, that a negotable promissory note is payment of the debt for which it is taken, is not a conclusive presumption, but is a presumption of fact and may be rebutted by evidence showing that such was not the intention. The fact that the result of giving effect to the presumption will be to deprive a party in a given case, of security which he has for the payment of his debt, will go a long way towards rebutting the presumption." Paddock, etc., Co. *v.* Simmons, 186 Mass. 152, 71 N. E. Rep. 298.

It has been said that the note should *prima facie* be considered as collateral security for the original debt. Manser *v.* Sims, 157 Ala. 167, 47 So. Rep. 270.

[33] Nightingale *v.* Chafee, 11 R. I. 609, s. c., 23 Am. Rep. 531.

"The taking of a note of one joint debtor in payment of the debt is generally held no satisfaction, unless there is an agreement to that effect." 35 L. R. A. N. S., p. 61 and see cases there cited.

[34] Vail *v.* Foster, 4 N. Y. 312.

See also Hummelstown Brownstone Co. *v.* Knerr, 25 Pa. Super. Ct. 465; Collins *v.* Busch, 191 Pa. 549, 43 Atl. Rep. 378.

Nothing short of an actual agreement will make the acceptance of the note of a third person more than collateral security. Wilhelm *v.* Schmidt, 84 Ill. 183.

And the note given by the trustees of a church did not release the church from its obligation on the failure of the trustees to meet the note. Lyons *v.* Planter's Loan, etc., Bank, 86 Ga. 485, 12 S. E. Rep. 882, 12 L. R. A. 155.

[35] Haines *v.* Pearce, 41 Md. 221, 231.

"One who claims that an order was received in full payment of an

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[35] Gibson *v.* Tobey, 46 N. Y. 637. For the rule as to presumption on taking note of a debtor for price of goods sold, see chapter XVI,

not to have been accepted in payment, but only as conditional payment, suspending the right of action

The burden is on defendant to show that it was given and received as payment,[36] though it is otherwise of an obligation of a third person transferred at the time of the creation of the debt.[37] Even when an express agreement is proved,

antecedent indebtedness must establish the fact that such order has been paid, or that it was expressly agreed that it should be so accepted." Estey *v.* Birnbaum, 9 S. Dak. 174, 68 N. W. Rep. 290.

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paragraph 47 of this vol. In those jurisdictions where the presumption is the other way, the presumption is not conclusive, and may be repelled by the circumstances of the transaction, even without extrinsic evidence. 3 Wall. 37, 46, citing Butts *v.* Dean, 2 Metc. (Mass.) 76.

The remedy is simply suspended during the currency of the new obligation. Willow River Lumber Co. *v.* Luger Furniture Co., 102 Wis. 636, 78 N. W. Rep. 762.

[36] Nightingale *v.* Chafee, 11 R. I. 609, s. c., 23 Am. Rep. 531; Noel *v.* Murray, 13 N. Y. 167; Smith *v.* Applegate, 1 Daly, 91; Crane *v.* McDonald, 45 Barb. 354; Philadelphia *v.* Neill, etc., Sav., etc., Co., 211 Pa. 353, 60 Atl. Rep. 1033; Mechanics' Nat. Bank *v.* Kielkopf, 22 Pa. Super. Ct. 128; Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. Rep. 537.

Where the evidence showed that after the maturity of the debt sued on, the plaintiff's agent tried to collect the debt but only succeeded in getting the debtor's note for the amount thereof, which he forwarded to the plaintiff, who declined to accept it in payment but sent the same to his attorney by whom it was returned to the debtor, a finding that the plaintiff had accepted the note as closing and settling the account was reversible error. Blumenthal & Bickart *v.* Green, 109 S. W. Rep. (Tex.) 1133.

[37] Youngs *v.* Stahelin, 34 N. Y. 258.

"It is true that if a creditor receives from his debtor the check or note of a third person contemporaneously with the contracting of the debt, the presumption is that it was agreed to be taken in payment, and the burden of proving the contrary rests on the creditor." Baird *v.* Spence, 8 Misc. 535, 28 N. Y. Supp. 774.

The plaintiff sold cattle to the defendants, receiving therefor a bank draft which was left with the bank for collection. The drawer bank was insolvent at the time although this fact was unknown to the parties. The draft was protested three days later. In an action for the price of the cattle, the court held that there was a presumption that the draft was taken in payment and the burden of proof was upon the plaintiff to meet this presumption by showing that such was not the case. Hall

if the paper be that of the debtor, it does not merge or extinguish the demand.[38] Acceptance of the negotiable promise of a third person,[39] or of the debtor and a third person jointly [40] on an agreement that it is to be satisfaction, extinguishes the original debt.[41] On the question whether a security transferred was accepted as absolute payment or only as a security, the value of the security compared with the debt is relevant.[42]

Securities shown to have been received in either way must be produced, or accounted for by plaintiff, in order to enable him to recover. The presumption is that they were duly

v. Stevens, 116 N. Y. 201, 22 N. E. Rep. 374, 5 L. R. A. 802.

[38] Cole *v.* Sackett, 1 Hill, 516, 1843; Waydell *v.* Luer, 5 Id. 448; and see Hill *v.* Beebe, 13 N. Y. 556.

[39] Booth *v.* Smith, 3 Wend. 66; Kellogg *v.* Richards, 14 Wend. 116.

Under a general denial in an action for money had and received, proof of payment by a person not a party to the suit is inadmissible. Kansas Nat. Bank *v.* Quinton, 57 Kan. 750, 48 Pac. Rep. 20.

If a receipt is intended to be proof of an agreement to receive the paper of third persons as absolute payment of that much in money, it should so provide. Where the receipt says nothing to that effect, it is very feeble proof in support of such a contention. Collins *v.* Busch, 191 Pa. 549, 43 Atl. Rep. 378.

[40] N. Y. State Bank *v.* Fletcher, 5 Wend. 85.

Similarly the giving of a note together with a chattel mortgage evinces an intention that the original debt was to be considered paid, the additional security being ample consideration for the new note. Keys *v.* Keys, 217 Mo. 48, 116 S. W. Rep. 537.

[41] But evidence of canceling the new security, is competent to show revivor of the original debt. Westcott *v.* Keeler, 4 Bosw. 564.

The agreement should be express. Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. Rep. 537.

[42] Wallis *v.* Randall, 16 Hun, 33.

"The presumption of payment, which ordinarily arises from the giving of a note governed by the law merchant, will be controlled when its effect would be to deprive the party who takes the note of a collateral security, or any other substantial benefit. In such cases the presumption of payment is rebutted by the circumstances of the transaction itself." Scott *v.* Edgar, 159 Ind. 38, 63 N. E. Rep. 452. See also Beach *v.* Huntsman (Ind. A.), 83 N. E. Rep. 1033.

Whenever it appears that the creditor had other and better security than a note for the payment of his debt, it will not be presumed that he intended to abandon his

paid, or would have been by use of due diligence.[43] In case of the note of the debtor, or such of several notes as remain unpaid,[44] it is enough to produce them at the trial for cancellation.[45] Where negotiable paper does not amount to payment within these rules, it may be shown to be at least conditional payment, by evidence that the creditor transferred it and that it is outstanding in the hands of others.[46]

Bank notes or other negotiable paper although paid in good faith, supposing them to be genuine,[47] or supposing the maker to have been solvent, may be shown to have been worthless or uncurrent, if the receiver was ignorant of the fact at the time of taking them,[48] and has not been guilty of laches in returning them.[49] The creditor cannot avoid the effect of payment by new security, by evidence that the security was illegal by reason of usury taken by him, although he might take advantage of usury proved by the debtor.[50]

security and rely upon his note. Citing Kidder *v.* Knox, 48 Me. 551; Spitz *v.* Morse, 104 Me. 447, 72 Atl. Rep. 178.

[43] Dayton *v.* Trull, 23 Wend. 345.

Where it appeared that a vendee gave notes of a third person in part payment for the purchase of land, and the failure to collect all that was due upon these notes was the result of a lack of due diligence on the part of the vendor, the loss thus resulting was held to fall upon the vendor, for "in accepting the notes the law imposed the obligation to use due diligence in their collection." Houston *v.* Evans et al., 17 S. W. Rep. (Tex.) 925.

[44] Lyman *v.* Bank of United States, 12 How. U. S. 225, affi'g 1 Blatchf. 297, 20 Vt. 666.

[45] Armstrong *v.* Cushney, 43 Barb. 340; Central City Bank *v.* Dana, 32 Barb. 296; Armstrong *v.* Tuffts, 6 Barb. 432; Johnston *v.* Jones, 4 Barb. 369. Otherwise, where a transferee has recovered judgment on the note. Teaz *v.* Chrystie, 2 E. D. Smith, 621, s. c., 2 Abb. Pr. 109. Whether, in case of a note of a third person, it is necessary to prove an offer to return made before action, compare with these cases, Hoopes *v.* Strasburger, 37 Md. 390, s. c., 11 Am. Rep. 538.

[46] See Battle *v.* Coit, 26 N. Y. 404, 406, and cases cited.

[47] Markle *v.* Hatfield, 2 Johns. 455.

[48] Ontario Bank *v.* Lightbody, 13 Wend. 101.

[49] Kenny *v.* First Nat. Bk. of Albany, 50 Barb. 112.

[50] La Farge *v.* Herter, 9 N. Y. 241.

13. — By Obligation of Joint Debtor, &c.

The individual note of one of two joint debtors or partners will not operate as payment of the joint debt, unless expressly received as such.[51] Evidence that it was receipted for as cash,[52] or that it was accompanied by a sealed security,[53] or that judgment was subsequently recovered on it,[54] is not enough. Evidence that a security given by one partner or joint debtor, was expressly accepted as payment, is competent to show exoneration of the others.[55]

14. — By Delivery of Property.

The delivery of property, other than money, by the debtor to the creditor, is not presumed as payment rather than as security.[56]

15. Payment of Collateral.

Payment of a collateral is presumptive evidence of a payment on the principal.[57]

[51] Claflin *v.* Ostrom, 54 N. Y. 581; King *v.* Lowry, 20 Barb. 532. Even though the note was that of the continuing parties given on the retiring of the defendant, who relies on it as payment. Nightingale *v.* Chafee, 11 R. I. 609, s. c., 23 Am. Rep. 531. Evidence that it was taken in payment with knowledge of an agreement between the partners that the maker assumed the debt, discharges the others. Millerd *v.* Thorn, 15 Abb. Pr. N. S. 371, s. c., 56 N. Y. 402.

"'In the absence of any technical release or discharge, under seal, of one joint trespasser, the receipt of money from one, with an agreement not to prosecute him, discharges the others only where such money is received as an accord and satisfaction for the whole injury; where it is received only as part satisfaction, it discharges the others only *pro tanto*.'" Musolf *v.* Duluth Edison Electric Co., 108 Minn. 369, 122 N. W. Rep. 499, 24 L. R. A. N. S. 451.

[52] Muldon *v.* Whitlock, 1 Cow. 290, 306; Vernam *v.* Harris, 1 Hun, 451, s. c., 3 Supm. Ct. (T. & C.) 483. *Contra*, Palmer *v.* Priest, 1 Sprague, 512. A higher security taken from one partner individually, is presumed taken as collateral. Nicholson *v.* Leavitt, 4 Sandf. 252. Compare Hoskinson *v.* Elliot, 52 Penn. St. 393.

[53] Rosc. N. P. 390, cit. Ansell *v.* Baker, 15 Q. B. 20.

[54] Claflin *v.* Ostrom (above).

[55] Macklin *v.* Crutchen, 6 Bush, 401.

[56] Perit *v.* Pittfield, 5 Rawle, 166;

[57] Prouty *v.* Eaton, 41 Barb. 409; Hunt *v.* Nevers, 15 Pick. 500, 504.

Payment of the principal security is presumptive evidence of the release of the collateral, unless equity requires its survival.[58]

Evidence that plaintiff transferred collaterals held by him, without evidence of the terms of transfer, raises a legal presumption in the debtor's favor that he transferred them absolutely and without recourse, and received the full amount due on their face, or elected to take them at that sum in satisfaction.[59]

16. Receipts.

If the contents or mode of signature of a receipt are to be proved, it must be produced or accounted for, so as to let in secondary evidence.[60] A receipt remaining in the creditor's possession (if separate from the instrument) is not, without explanation, evidence that the payment acknowledged in it was made.[61] The suppression of some of a series of receipts admitted to be in possession of the party who produces the others, is evidence that the receipts withheld afford inferences unfavorable to that party who withholds them.[62] Neither a simple unsealed receipt,[63] even though official,[64] nor the

and see Dudgeon *v.* Haggart, 17 Mich. 273.

[58] McGiven *v.* Wheelock, 7 Barb. 22.

[59] Hawks *v.* Hinchcliff, 17 Barb. 492.

[60] Romayne *v.* Duane, 3 Wash. C. Ct. 246.

[61] Nelson *v.* Boland, 37 Mo. 432.

[62] James *v.* Biou, 2 Sim & Stu. 600, 607. Or, perhaps more strictly, should be said to support the most unfavorable construction that other evidence, actually adduced, will properly bear.

But where a defendant, in an action upon a note, produced receipts for several payments which he claimed had been made in addition to those indorsed upon the back of the note, it was held that the jury was not warranted in ignoring the payments evidenced by the receipts produced, although plaintiff's agent testified that all payments made had been indorsed upon the note. Watson *v.* Miller, 82 Tex. 279, 17 S. W. Rep. 1053.

[63] Battle *v.* Rochester City Bank,

[64] Johnson *v.* United States, 5 Mas. 425.

A receipt may be explained by parol. See Harvey *v.* Denver, etc., R. R. Co., 44 Colo. 258, 99 Pac. Rep. 31, 130 Am. St. Rep. 120.

usual receipt for payment of purchase money contained in a sealed conveyance,[65] is conclusive evidence of the payment acknowledged in it.[66] And it may be impeached or avoided, although plaintiff has not alleged the facts he offers in evi-

3 N. Y. 88; Wadsworth *v.* Allcott, 6 N. Y. 64.

A receipt for money is *prima facie* evidence of payment only and may be explained or contradicted by parol. Harvey *v.* Denver, etc., R. R. Co., 44 Colo. 258, 99 Pac. Rep. 31, 130 Am. St. Rep. 120

"A receipt in full given by a creditor to his debtor is *prima facie* what its language indicates, viz[s] a complete payment of all that is due the creditor, and though it may be contradicted, it becomes, in the absence of evidence that full payment was not in fact made, conclusive and cannot be ignored." Wherley *v.* Rowe, 106 Minn. 494, 119 N. W. Rep. 222.

[65] Brown *v.* Cabalin, 3 Ore. 45, and see chapter XLVIII, paragraphs 9 and 10 of this vol.

" Receipts, whether contained in deeds or elsewhere, are not conclusive of the payment of money, but only *prima facie* proof and always open to explanation. Thus, an acknowledgment of the purchase money in the body of a deed and a receipt endorsed, are not conclusive evidence of such payment. A receipt for the purchase money endorsed on a deed is only *prima facie* evidence and may be rebutted by evidence." In re McPherran, 212 Pa. 425, 61 Atl. Rep. 954.

[66] A written receipt for the payment of a previous indebtedness is not such a written contract that it cannot be contracted, varied or explained by parol evidence. Joslin *v.* Giese, 59 N. J. L. 130, 36 Atl. Rep. 680; Bulwinkle *v.* Cramer, 27 S. C. 376, 13 Am. St. Rep. 645, 3 S. E. Rep. 776; Sheaffer *v.* Sensenig, 182 Pa. St. 634, 641, 38 Atl. Rep. 473. Thus a receipt "in full of all claims to date" is only *prima facie* evidence of its contents, and may be shown by parol evidence not to include the claim in suit. Mounce *v.* Kurtz, 101 Iowa, 192, 70 N. W. Rep. 119. The circumstances attending the execution of such a receipt may be given in evidence to show that by mistake it was made to express more than was intended, and that the creditor had, in fact, claims that were not included. Fire Ins. Association *v.* Wickham, 141 U. S. 564. Where, in the date of a receipt, the month was abbreviated and it was a matter in dispute as to whether the abbreviation was intended for January or July, it was held that it was competent for an expert in handwriting, after comparison of the abbreviation in question with similar abbreviations in writings of the person who wrote the receipt, to give his opinion as a witness as to the month intended by the abbreviation. Dresler *v.* Hard, 127 N. Y. 235, 27 N. E. Rep. 823.

dence for the purpose.[67] Where a contract is embodied with the receipt, in one paper, the part constituting the receipt is open to explanation.[68]

The language of the instrument, so far as it relates to the fact of delivery, the thing delivered,[69] and the question whether the words "received payment," or their equivalent, represented an agreement to accept in satisfaction, may be contradicted or varied by parol.[70] But the contradiction to

The effect of a receipt is to create a rebuttable presumption. Chattanooga First Nat. Bank *v.* Behan, 91 Ky. 560, 16 S. W. Rep. 368.

[67] Van Nest *v.* Talmage, 17 Abb. Pr. (N. Y.) 99, 105.

[68] Smith *v.* Holland, 61 N. Y. 635. See Komp *v.* Raymond, 175 N. Y. 102, 67 N. E. Rep. 113.

"A writing may be both a receipt and an agreement or contract, in which case that portion operative only as a receipt might be explained or contradicted, like any other receipt." Hossack *v.* Moody, 39 Ill. App. 17.

When a deed in fee simply contained the usual form of receipt of the purchase money in full, this receipt was not conclusive, and it was permissible to be shown in rebuttal that the grantor had received a mortgage on the premises conveyed to secure part of the purchase price. In re McPherran, 212 Pa. St. 425, 61 Atl. Rep. 954. See also Nichols *v.* Nichols, 133 Pa. 438, 19 Atl. Rep. 422.

[69] Tobey *v.* Barber, 5 Johns. 68.

"Receipts may be explained orally," and there is no error in admitting parol evidence to explain the fact that the receipts are in the name of a party other than the one holding them. Starkweather *v.* Maginnis, 196 Ill. 274, 63 N. E. Rep. 692. See also Emmett *v.* Penoyer, 151 N. Y. 564, 45 N. E. Rep. 1041; Larabere *v.* Wise, 7 Cal. Unrep. Cas. 107, 71 Pac. Rep. 175, 17 Cyc. 629, note.

[70] Buswell *v.* Pioneer, 37 N. Y. 312, s. c., 4 Abb. Pr. N. S. 244, 35 How. Pr. 447; Richard *v.* Wellington, 66 N. Y. 308. Otherwise where the note was stated to be received in "full payment." Howard *v.* Norton, 65 Barb. 161. A receipt for a note with a stipulation that, if discounted, a certain sum is to be applied to a specific indebtedness, held not capable of being varied as to the stipulation by parol. Stapleton *v.* King, 33 Iowa, 28, s. c., 11 Am. Rep. 109, and cas. cit.

It has been held that the words "in full payment" recited in a receipt for a note were not contractual, but merely indicated the existence and acceptance of the note, and parol evidence was therefore admissible to vary and explain the receipt. Gravlee *v.* Lamkin, 120 Ala. 210, 24 So. Rep. 756.

which a receipt is subject is of some fact which is stated in it.[71]

Words in the receipt stating that the payment, or a security transferred, was received "as a compromise" [72] or "without recourse," [73] constitute a contract within the rule excluding oral evidence to vary the terms of the instrument; and to avoid the effect of a receipt of money in full of an unliquidated claim, oral evidence is not admissible to show that it was given upon a condition not expressed in it.[74]

He who seeks to recover, notwithstanding his receipt, must prove his case clearly and show how he came to give such a receipt.[75] But a receipt, unexplained or uncontradicted, is conclusive.[76] A letter which accompanied the receipt is, if relevant, competent as part of the *res gestæ*.[77]

17. Part Payment, in Full.

Part payment accepted in full, may be proved as a bar,

[71] Green *v.* Rochester, &c. Co., 1 Supm. Ct. (T. & C.) 5.

[72] Kellogg *v.* Richards, 14 Wend. 116, NELSON, J.

[73] Graves *v.* Friend, 5 Sandf. 568.

[74] Coon *v.* Knapp, 8 N. Y. 402.

[75] Chapman *v.* Railroad Co., 7 Phil. (Pa.) 204. Though a written receipt may be explained by parol, yet it is *prima facie* evidence of the most satisfactory character of the facts recited therein and to impair its force, the proof must be clear. Ennis *v.* Pullman Palace Car Co., 165 Ill. 161, 46 N. E. Rep. 439.

The burden of explaining the receipt and showing that there was a mistake in giving it, is upon the plaintiff. Long *v.* Long, 132 Ill. App. 409.

[76] Lambert *v.* Seely, 17 How. Pr. 432. See Wherley *v.* Rowe, 106 Minn. 494, 119 N. W. Rep. 222. For the rule as to explaining alterations, see chapter XXI, paragraph 31 and chapter XLVIII, paragraph 7 of this volume, applied to a receipt in Printup *v.* Mitchell, 17 Ga. 558. Compare Thrasher *v.* Anderson, 45 Geo. 539.

"A receipt in full must be regarded as an acquittance in bar of any further demand in the absence of any allegation and evidence that it was given in ignorance of its purpose, or any circumstances constituting duress, fraud or mistake." Chicago, Milwaukee & St. Paul Ry. Co. *v.* Clark, 178 U. S. 353, 20 S. Ct. 924, 44 L. ed. 1099.

[77] Foster *v.* Newbrough, 66 Barb. 645, rev'd in 58 N. Y. 481, for lack of foundation for secondary evidence.

either by a sealed release;[78] or on proof that it was made by way of compromise, and accepted on release of the balance;[79] or, if the claim paid arose on a written obligation, by evidence that the obligation was surrendered to be canceled, on payment of the part with an agreement to accept it in full.[80]

In other cases, payment and acceptance of a sum of money

[78] See paragraphs 30–32.

[79] Blair *v.* Wait, 69 N. Y. 113, affi'g 6 Hun, 477. Where a claim for an uncertain amount is made, and the auditing officers of the government state it at a reduced sum, the creditor's acceptance of a draft for the amount and collection of it without objection, is an acceptance in full satisfaction of the claim. Baird *v.* United States, 96 U. S. (6 Otto) 430. Where, on a loss of several things insured, the value of one, as to which there is no dispute, is paid on condition that the insured waives his claim as to the others, this is no consideration, and without a technical release such other claims are not discharged. Redfield *v.* Holland Purchase Ins. Co., 56 N. Y. 354.

"Part payment on the principal of an indebtedness, which is liquidation or capable of liquidation by calculation, will constitute a full discharge of the debtor's obligation in two instances only: (1) where there has been a *bona fide* dispute as to the amount due, and the controversy is compromised and settled by the parties, and the debtor pays and the creditor accepts an amount agreed upon by them as in full discharge of the debt, and (2) where a part payment is made and accepted by the creditor in full, the acceptance being supported by a new consideration sufficient to support an ordinary contract." Wherley *v.* Rowe, 106 Minn. 494, 119 N. W. Rep. 222.

[80] Ellsworth *v.* Fogg & Harvey, 35 Vt. 355; Draper *v.* Hilt, 43 Vt. 439, s. c., 5 Am. Rep. 292; McKenty *v.* Universal Life Ins. Co., 3 Dill. C. Ct. 448. To establish the settlement of a large and unquestionable claim, by payment of a small sum, the evidence should be clear and satisfactory. Home Ins. Co. *v.* Western Transp. Co., 51 N. Y. 93, affi'g 4 Rob. 257, s. c., 33 How. Pr. 102. Whether the solvency or insolvency of the debtor is competent, as tending to show whether acceptance of part in full was probable or improbable, compare Keeler *v.* Salisbury, 33 N. Y. 656; Molyneaux *v.* Collier, 13 Geo. 406.

Where the plaintiff surrendered a note made by the defendant for one hundred fifty dollars upon a payment of one hundred dollars, and there was positive evidence that the plaintiff made a mistake in so surrendering the note and unconvincing evidence that the defendant considered the note

(as distinguished from merchandise or other property in gross), less than a liquidated debt, is only payment *pro tanto*. Payment of a less sum, or a promise to pay it, though reinforced by additional security of the debtor's own means, is not satisfaction; but an acceptance of an obligation or collateral security of a third person on his property, is.[81]

A receipt for payment in full may be rebutted,[82] except so far as it is conclusive under the preceding rules. Evidence of declarations of the creditor, made at the time of the payment, to the effect that more was due him, is competent in his own favor.[83]

A receipt expressed to be in full of all accounts, will sustain a finding of a settlement of accounts on both sides.[84]

A receipt in full of all demands against one person is not,

paid in full, the plaintiff may recover the balance from the defendant. Van Norden Trust Co. *v.* Spar, 111 N. Y. Supp. 674.

[81] Keeler *v.* Salisbury, 33 N. Y. 648, 653, affi'g 27 Barb. 485.

Payment of a sum less than the full amount of the debt will not constitute a defense to a suit for the balance. Harvey *v.* Denver, etc., R. R. Co., 44 Colo. 258, 99 Pac. Rep. 31, 130 Am. St. Rep. 120.

"The acceptance by a creditor of the note of a third person, in full satisfaction of an existing debt, is an extinguishment of the original indebtedness, and this is true, although the note is taken for a less sum than the whole debt." Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. Rep. 537.

[82] For instance, by evidence of compulsion. Thomas *v.* McDaniel, 14 Johns. 185; Rourke *v.* Story, 4 E. D. Smith, 54. So, evidence that there was another account between the parties, and that the partner who gave the receipt was not accustomed or able to attend to the business, is sufficient to go to the jury. Lynch ads. Welch, 5 N. Y. Leg. Obs. 20. Compare Berrian *v.* Mayor, &c. of N. Y., 4 Rob. 538.

Where a subcontractor assigned to his creditor the amount which was to become due him from the principal contractor for performing certain work for the latter and the assignee gave a receipt in full to the contractor upon payment of an amount which did not appear to equal that claimed by the subcontractor, it was held that this receipt did not bind the latter since his assignee had no authority to settle or adjust a controversy between the other parties. Moore *v.* Vickers, 3 Colo. App. 443, 34 Pac. Rep. 257.

[83] Dillard *v.* Scraggs, 36 Ala. 670.

[84] Alvord *v.* Baker, 9 Wend. 323.

alone, evidence of payment of a joint demand against him and another.[85]

18. Admissions; Entries and Memoranda.

Evidence of an admission by the creditor, or by his agent, made within the scope of his authority,[86] that he had received payment,[87] is competent; but is not conclusive,[88] unless acted on so as to raise an estoppel. An admission of payment in full, is competent, although the specific payments of which there is other evidence, are less than the amount of the whole debt.[89]

The payer's entry in his account is not evidence in his own favor,[90] of the fact of payment, unless shown to have been brought to the knowledge of the creditor,[91] or unless the entry is admissible on some ground applicable to other memoranda.[92]

19. Possession of Instrument; Indorsements.

In a conflict of evidence on a question of payment of a written security, possession of the security by the creditor will usually sustain a finding of non-payment.[93] Possession

[85] Walker *v.* Leighton, 11 Mass. 140.

[86] McRea *v.* Insurance Bank of Columbus, 16 Ala. 755.

[87] Otherwise, of an admission of having settled, which may merely mean adjustment. Fort *v.* Gooding, 9 Barb. 371. Otherwise, also, of mere declarations of intent never to collect. McGuire *v.* Adams, 8 Pa. St. 286.

[88] Ray *v.* Bell, 24 Ill. 444.

[89] Henderson *v.* Moore, 5 Cranch, 11.

[90] Brannin *v.* Foree, 12 B. Mon. (Ky.) 506; Whitehouse *v.* Bank of Cooperstown, 48 N. Y. 239.

[91] Meyer *v.* Reichardt, 112 Mass. 108.

[92] The Queen *v.* Exeter, L. R. 4 Q. B. 341, Chapter XVI, paragraphs 34, etc., of this vol.

[93] Brembridge *v.* Osborne, 1 Stark. 374.

The legal effect of the possession of an instrument for the payment of money is *prima facie* evidence that the debt therein set forth is unpaid. Melink *v.* Coman, 111 Ill. App. 583.

Accordingly where it was a question of whether or not the decedent had paid all his debts, the presumption arose that a note, signed by him and found uncan-

by the debtor, or obligor, even though only a surety, raises a presumption of payment,[94] but is not conclusive.[95]

A notice to produce an instrument, for any purpose, is sufficient to admit parol proof of indorsements upon it, of payments.[96]

20. Presumption of Payment from Subsequent Transactions.

Defendant may show that after the time when the debt sued for is alleged to have become due and payable, plaintiff gave him a promissory note,[97] or other obligation,[98] or security,[99] for the payment of money; and, in the absence of anything to show what was the consideration of the later obligation, there is a legal presumption that no previous indebtedness from defendant to plaintiff existed.[1] Defendant may prove the later obligation by parol, without producing or accounting for the writing.[2] This throws the burden

celled among the papers of another decedent was unpaid. Johnson *v.* Gooch, 116 N. C. 64, 21 S. E. Rep. 39.

[94] Carroll *v.* Bowie, 7 Gill (Md.), 33, 41. So, also, of possession of a mortgage and the bond, by a grantee of the land. Braman *v.* Bingham, 26 N. Y. 483.

The possession of a note by the maker thereof after maturity is presumptive or *prima facie* evidence of payment. Smith *v.* Gardner, 36 Neb. 741, 55 N. W. Rep. 245. See also Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. Rep. 188.

[95] Graves *v.* Wood, 3 B. Mon. (Ky.) 34.

The presumption of payment arising from possession does not exist unless the possession is free from suspicion. Thus no such presumption arose when a son produced his note payable to his father and it appeared that the latter was of unsound mind and living with the son under his care; especially since the son held a key to the desk in which the father kept his papers. Erhart *v.* Dietrich, 118 Mo. 418, 24 S. W. Rep. 188.

[96] Howell *v.* Huyck, 2 Abb. Ct. App. Dec. 423.

[97] De Freest *v.* Bloomingdale, 5 Den. 304; Duguid *v.* Ogilvie, 3 E. D. Smith, 527, s. c., 1 Abb. Pr. 145.

[98] Callaway *v.* Hearnl, 1 Houst. (Del.) 607.

[99] Chewning *v.* Proctor, 2 M'Cord, 11, 15.

[1] De Freest *v.* Bloomingdale (above); Duguid *v.* Ogilvie (above).

[2] Mead *v.* Brooks, 8 Ala. 840.

on plaintiff to show that the demand in suit was not settled; but slight evidence may be sufficient for this purpose.[3]

Evidence of the payment of one instalment of rent, in the absence of other evidence, raises a legal presumption that prior instalments were paid; [4] and, upon the same principle, evidence of the payment of one of a series of instalments accruing under any contract, or one of a series of obligations taken upon the same transaction, is competent as tending to show payment of those preceding.[5] Where by the contract,[6] or the law,[7] payment was a condition precedent to the performance of another act, evidence that such act was performed, is competent to sustain an inference that payment had been made.

21. Circumstantial and Corroborative Evidence.

On the mere question of payment it is not competent to show, for the purpose of raising a presumption of payment that it was the debtor's habit to pay his debts promptly; [8] nor that in enumerating them he made no mention of the debt in suit; [9] nor that he was responsible and at hand, and

[3] Chewning *v.* Proctor (above).

[4] Patterson *v.* O'Hara, 2 E. D. Smith, 58; Decker *v.* Livingston, 15 Johns. 479.

"There can be no question about the correctness of the general proposition that a receipt for rent covering a particular month affords presumptive evidence that rent previously accruing has been paid." Ottens *v.* Fred Krug Brewing Co., 58 Neb. 331, 78 N. W. Rep. 622.

[5] But the value of such evidence in cases other than those of rent, where dispossession so commonly follows default, depends upon the circumstances of the case. Compare Matthews *v.* Light, 40 Me. 394; Bougher *v.* Kimball, 30 Mo. 193; Sennett *v.* Johnson, 9 Penn. St. 335.

[6] Reynolds *v.* Richards, 14 Penn. St. 205.

[7] Terry *v.* N. Y. Central R. R. Co., 22 Barb. 574.

[8] Abercrombie *v.* Sheldon, 8 Allen (Mass.), 532. *Contra*, Orr *v.* Jackson, 1 Ill. App. 439.

[9] Id.

In an action by a wife upon a claim against her deceased husband's estate to which a plea of payment is interposed, evidence as to what the husband had said to third persons that he intended to do with the money which the proof shows he had promised to repay to the plaintiff upon demand, is purely hearsay and properly

that the creditor was pressed for money, yet made no claim.[10] But such evidence may be competent on the question whether the debt ever existed, especially where it is a stale claim.[11] The solvency or wealth of the defendant at the time of the alleged payment is not competent; [12] nor is the fact that he borrowed money ostensibly for the purpose of paying.[13]

Evidence that a person authorized to receive, but who is since deceased, went to defendants' place of business for the purpose of settling with them, and that he had no money before he went in, and that within he saw defendants, and that he was seen to come out with money which he said he got of defendants, is sufficient to sustain a finding of payment.[14] Evidence that a witness showed the money directly after the interview in which he testifies it was paid to him, is competent as having a tendency to confirm his testimony.[15]

22. Application by the Debtor.

If a payment is voluntarily made by the debtor, its application by him to one of several debts or accounts may be inferred from his conduct,[16] or even from circumstances

excluded. Hamby *v.* Brooks, 86 Ark. 448, 111 S. W. Rep. 277.

[10] Beach *v.* Allen, 7 Hun, 441. *Contra*, Orr *v.* Jackson (above).

[11] Church *v.* Fagan, 43 Mo. 123; Fisher *v.* Plimpton, 97 Mass. 441; Marshall *v.* Marshall's Admr., 12 B. Mon. (Ky.) 459; Nicholls *v.* Van Valkenburgh, 15 Hun, 230; Thorp *v.* Goewey, 5 Rep. 619.

[12] Veazie *v.* Hosmer, 11 Gray, 396; Church *v.* Fagin, 43 Mo. 123; 1 Dan. Negl., § 1229. It may have been the motive for plaintiff's confidence in not collecting. Hilton *v.* Scarborough, 5 Gray, 422.

[13] Reed *v.* Pearson, 3 N. J. L. (2 Pa.) 681. Compare Burlew *v.* Hubbell, 1 Supm. Ct. (T. & C.) 235.

[14] Whisler *v.* Drake, 35 Iowa, 103. Whether evidence of simultaneous payment of other like claim—such as laborers on a pay-roll—is competent, compare Filer *v.* Peebles, 8 N. H. 226, and chapter XIX, paragraph 29 of this vol.

[15] Chester *v.* Dickerson, 54 N. Y. 1, affi'g 52 Barb. 349.

[16] Peters *v.* Anderson, 5 Taunt. 596; and see 22 Wend. 554.

A debtor has always the right to designate the particular indebtedness to which the payments made by him are to be credited. Howard *v.* London Mfg. Co., 72 S. W. Rep. 771, 24 Ky. L. 1934.

alone,[17] or from his interest, under circumstances not manifesting any other intention.[18] But for this purpose a declaration, or circumstances not known to the creditor at the time, are not competent to defeat an exercise of the right of application by the creditor.[19] To show the debtor's application, his letter, or that of his general agent, to the creditor, at the time,[20] or the declarations of the bearer of the money, made at the time of delivering it to the creditor,[21] are competent in the debtor's favor. Where there is such evidence, the creditor's prior letter of demand is not competent to show a different application.[22] In the absence of other evidence, application expressed in a receipt will control; [23] but application wrongfully made, although indicated by a receipt

[17] Stone *v.* Seymour, 15 Wend. 19, 24; Howland *v.* Rench, 7 Blackf. (Ind.) 236.

But where one assumes the payment of certain notes and gives the holder thereof certain other notes as additional security and makes payments to him which are credited on the notes last given, there is no presumption that the debtor directed the payments to apply on the first mentioned notes. Powers *v.* McKnight (Tex. Civ. App.), 73 S. W. Rep. 549.

[18] Such as the fact that the payment was precisely the amount of one debt and not that of another. Robert *v.* Garnie, 3 Cai. 14; Seymour *v.* Van Slyck, 8 Wend. 403; Davis *v.* Fargo, Clarke, 470.

[19] Munger on App. 28.

Where the question is whether the payment which the defendant made to the plaintiff's intestate was to be applied on the note upon which the action is brought, it is incumbent on the defendant to show that the payment was so made. White *v.* White, 44 S. W. Rep. 83, 19 Ky. L. 1590.

[20] Mitchell *v.* Dall, 2 Har. & G. (Md.) 159.

It appeared that a debtor mailed a letter to his creditor directing the application of money which he expressed to him on the same day. This letter was never received by the creditor who on receipt of the money sent a receipt showing a different application. The debtor returned this receipt and in a new letter repeated his original direction. Under these facts it was held that an application by the debtor had been established. Mulherin Sons & Co. *v.* Stansell, 70 S. C. 568, 50 S. E. Rep. 497.

[21] Gay *v.* Gay, 5 Allen (Mass.), 157.

[22] Mitchell *v.* Dall (above).

[23] Stewart *v.* Keith, 12 Penn. St. 238.

Under the Louisiana Code, if the debtor accepts a receipt "by which the creditor has imputed what he has received to one of his

sent to the payer, does not bind him. If he had previously communicated his dissent to such application, his silence on receiving the receipt will not conclude him.[24] Evidence of a request from the debtors to the creditor, to pay himself out of their property in his hands, is not evidence of payment without something to indicate compliance with the request.[25]

23. — By the Creditor.

In the absence of evidence of an application by the debtor, an application by the creditor may be proved. If the creditor claims application to a debt other than that in suit, it is for him to prove the existence of the obligation,[26] and, if

debts specially, the debtor can no longer require the imputation to be made to a different debt." And likewise, where the debtor has from time to time gone over the creditor's books with him and has made no objection to the manner in which the creditor has imputed payments made to him, the failure to object is held to estop him from demanding that a different application be made. Baker *v.* Smith, 44 La. Ann. 925, 11 So. Rep. 585.

[24] *Per* BRONSON, J., Starkweather *v.* Kittle, 17 Wend. 20.

Where a debtor had directed the application of a payment to a certain indebtedness, the court held that the creditor was bound by this application and the simple fact that the creditor executed a receipt showing an application to another debt did not make it incumbent upon the debtor to have the receipt changed. Eylar *v.* Read, 60 Tex. 387.

[25] King *v.* Bush, 36 Ill. 142.

Application "by either party" may be proved as well by circumstances as by express declarations. Snell *v.* Cottingham, 72 Ill. 124.

[26] Mann *v.* Major, 6 Rob. (La.) 475. See Cook *v.* Guirkin, 119 N. C. 13, 25 S. E. Rep. 154.

Where a balance of account is in a creditor's hands he may apply it to any one of several debts due to him, provided the debtor himself does not state on which debt it shall apply; but he has no right to apply it to a debt held by some third person except by the debtor's direction. Turner *v.* Hill, 56 N. J. Eq. 293, 39 Atl. Rep. 137.

When it appears that a payment was promptly applied by a creditor to one of several debts, if the payor questions the creditor's right to have so applied it, he must show that he had otherwise directed. It cannot be presumed that an application made by a creditor was wrongful. Fisher *v.* Rake, 4 Ky. Law Rep. 837.

Where the defendant pleads pay-

written, he must produce it or account for it, before giving oral evidence of it.[27] For the purpose of proving the application, the like indirect evidence of intention is competent, as in case of application by the debtor;[28] and moreover the entries made by the creditor in his own books of account at the time of the payment, are competent evidence in his behalf,[29] but are not conclusive. Crediting on an open ac-

ment and to establish it offers in evidence a paid check for the amount in suit without showing the purpose for which such check was given, the presumption is that it was given in payment of the indebtedness and the defendant need not further show that there were no other dealings or transactions for which it might have been given. Lynch *v.* Lyons, 131 App. Div. 120, 115 N. Y. S. 227.

Where the defendant seeks to establish a credit by exhibiting a check payable to the plaintiff and shows that it was paid to him, the plaintiff has the burden of proving that the amount was paid on some other account. Hill *v.* Pettit, 66 S. W. Rep. 188, 23 Ky. L. 2001.

[27] Trundle *v.* Williams, 4 Gill (Md.), 313.

Where the defendant had several indebtednesses to the plaintiff and made payments but did not direct the plaintiff as creditor to apply them to any particular debt, it was held that the plaintiff was justified in appropriating the payments at his election to any claim which he held against his debtor. Dye *v.* Peacock, 5 Ga. App. 417, 63 S. E. Rep. 520.

[28] Truscott *v.* King, 6 N. Y. 147.

A contractor presented a bill for a balance which he claimed was due on a contract under which he had filed a mechanic's lien and on two previous contracts. Subsequently he presented a bill for balances claimed under the latter two contracts which balances appeared greater than the balance shown by the first bill. It was held that these circumstances clearly showed an application of payments made to the contract under which he claimed the lien which was thereby extinguished. Reynolds *v.* Patten, 10 Misc. 155, 30 N. Y. Supp. 1050.

[29] Van Rensselaer *v.* Roberts, 5 Den. 470.

Entries in a creditor's account books wherein he credited payments to one of several debts owing by the defendant, though not conclusive, are competent to show the appropriation intended. Missouri Cent. Lumber Co. *v.* Stewart, 78 Mo. App. 456.

But it has been held that a debtor could be presumed to have applied his payments to the interest on his debt merely from the fact that the said payments appeared to have been so entered in the creditor's books to which the debtor had no access. Second

count implies intent to apply to the earlier items, notwithstanding the creditor holds security for those only.[30] But crediting on a private account is not conclusive, unless communicated to the debtor.[31]

24. — By the Court.

When application devolves upon the court because of no application by the parties being shown, evidence of the existence of the other debts is admissible.[32]

Natl. Bank of Richmond *v.* Fitzpatrick, 111 Ky. 228, 63 S. W. Rep. 459, 23 Ky. L. 610, 62 L. R. A. 599.

[30] Id. s. p., Crampton *v.* Pratt, 105 Mass. 255. So, also, notwithstanding those items had been barred. Hill *v.* Robbins, 22 Mich. 475. Compare Mills *v.* Fowkes, 5 Bing. N. C. 455.

The law implies that payments made generally upon notes are to be applied in the order of their maturity. In re Stevens, 107 Fed. Rep. 243.

In the absence of some contrary arrangement, payments upon a total bill must be assumed to have been applied to the oldest items. Hurd *v.* Wing, 93 App. Div. 62, 86 N. Y. Supp. 907.

Where the creditor says in effect "'the sum you owe me is not the balance at the foot of the account, neither is it a balance from the head of the account, but is for items found neither at the head nor foot, but for credit extended at a particular period of the account just before I learned certain facts which preclude me from looking to you for credit extended after the particular time and place in the account where I now locate my claim,' the burden to establish such a peculiar balance rests very heavily upon the creditor." Rickerson Roller-Mill Co. *v.* Farrell Foundry, etc., Co., 75 Fed. Rep. 554, 23 C. C. A. 302.

[31] Allen *v.* Culver, 3 Den. 284; Seymour *v.* Marvin, 11 Barb. 80. Nor even then always conclusive evidence of intention. Dulles *v.* De Forest, 19 Conn. 190.

Where a bank holds notes of a person and receives payments with no application indicated by the debtor, there is no presumption that the debtor made an application of his payments to interest, from the fact that the bank so applied the payments on its books without his knowledge. Sec. Nat. Bank of Richmond *v.* Fitzpatrick, 111 Ky. 228, 63 S. W. Rep. 459, 23 Ky. L. 610, 62 L. R. A. 599.

[32] Robinson *v.* Allison, 36 Ala. 525, 531.

In the absence of any direction as to application by either the debtor or the creditor the court will usually apply the payment to the debt which has the least security. Turner *v.* Hill, 56 N. J. Eq. 293, 39 Atl. Rep. 137; Cain *v.*

25. Presumption of Payment from Lapse of Time.

Under an allegation of payment, the legal presumption of payment is available [33] which arises from the mere lapse of twenty years from the time a payment is due. This presumption is usually defined with important qualifications in the statutes; which should be consulted. At common law, and in equity,[34] great lapse of time without part payment or other recognition, is a circumstance which, with others, may tend to show payment; [35] and if extending for twenty

Vogt, 138 Iowa, 631, 116 N. W. Rep. 786, 128 Am. St. Rep. 216.

"The law applies a payment first to a debt with the least security, unless there be peculiar equities calling for a different appropriation, but the law would certainly not sanction the application of the payment made by a third person, at the expense of and for the benefit of another, to an obligation upon which neither the person nor the debtor for whose benefit the arrangement had been made was liable." Wipperman *v.* Hardy, 17 Ind. App. 142, 46 N. E. Rep. 537.

[33] Sheldon *v.* Heaton, 22 App. Div. 308; New York Life Ins. & Trust Co. *v.* Covert, 3 Abb. Ct. App. Dec. 350, 29 Barb. 435, 441; Malloy *v.* Vanderbilt, 4 Abb. New Cas. 127, 132; and see Livingston *v.* Livingston, 4 Johns. Ch. 287.

When more than thirty years had passed since the time fixed for the payment of the balance of the purchase price of a parcel of land, the presumption of such payment must obtain. Berger *v.* Waldbaum, 46 Misc. 4, 93 N. Y. Supp. 352, aff'd judgment 110 App. Div. 915, 96 N. Y. S. 1114.

[34] Giles *v.* Baremore, 5 Johns. Ch. 545.

"This presumption is an artificial and arbitrary rule of the law, derived by analogy from the English statute of limitations; it originated in equity, but was afterwards engrafted into the common law, and has since been steadily maintained." Gregory *v.* Commonwealth, 121 Pa. St. 611, 15 Atl. Rep. 452, 6 Am. St. Rep. 804. See also Breneman's Appeal, 121 Pa. St. 641, 15 Atl. Rep. 650. See also Green. Ev. Ch. 6, § 39.

[35] Where the time is less than the statute period, any accompanying circumstances tending to explain or repel the presumption are evidence for the jury. Jackson *v.* Sackett, 7 Wend. 94. The facts that defendant had been solvent and accessible (Husky *v.* Maples, 2 Coldw. [Tenn.] 25), and that plaintiff had been pressed for money (Levers *v.* Van Buskirk, 4 Penn. St. 309, 314), have been received in aid of the presumption. *Contra*, Daby *v.* Ericsson, 45 N. Y. 786, and see paragraph 21.

years [36] from the time the obligation was due and payable,[37] and before the commencement of the proceeding on it,[38] raises (except against the government)[39] a legal, but not conclusive [40] presumption that payment has been made,

In all cases where the statute of limitations has not run, the persumption of payment, if any, is one of fact and not of law. Rosenstock *v.* Dessar, 85 App. Div. 501, 83 N. Y. Supp. 334.

[36] De Ford *v.* Green, 15 Del. 316, 40 Atl. Rep. 1120; Connecticut Mut. Life Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. Rep. 345, 91 Am. St. Rep. 769, 58 L. R. A. 694. Exclusive of disabilities. Dunlop *v.* Ball, 2 Cranch, 180; Higginson *v.* Mein, 4 Id. 415. A presumption arises after twenty years from the accrual of a right to a legacy, that it has been paid, but the presumption may be rebutted by any credible evidence that it is still unpaid. Magee *v.* Bradley, 54 N. J. Eq. 326, 35 Atl. Rep. 103.

The strength of the presumption increases with each succeeding year. Richards *v.* Walp, 221 Pa. 412, 70 Atl. Rep. 815; In re Geiger, 14 Pa. Super. Ct. 523.

"The jury may infer payment from circumstances although twenty years have not elapsed." Sheldon *v.* Heaton, 22 App. Div. 308, 47 N. Y. Supp. 1124.

Where an item sought to be recovered was less than ten years old, there was no presumption that it was paid. Where a presumption of payment arises as a matter of law from the lapse of time, it does so only after a period of twenty years and even then it is "subject to be removed by evidence." Fletcher *v.* Fletcher, 72 Vt. 268, 47 Atl. Rep. 777.

[37] Thus in case of rent, or a bond payable by instalments, the presumption arises as to each instalment, at the expiration of the period from the time it became due. Lyon *v.* Odell, 65 N. Y. 28; Slate *v.* Lobb, 3 Harr. (Del.) 421, 423.

The presumption of payment only begins to arise at the time when some statute of limitations commences to run. Rosenstock *v.* Dessar, 85 App. Div. 501, 83 N. Y. Supp. 334.

[38] Driggs *v.* Williams, 15 Abb. Pr. 477.

The common law rule of presumption of payment only applies to cases where twenty years have elapsed after the right of action accrued. Updike *v.* Lane, 78 Va. 132.

[39] United States *v.* Williams, 4 McLean, 567, 5 Id. 133.

[40] People *v.* Freeman, 110 App. Div. 605, 97 N. Y. Supp. 343; Shotwell *v.* McCardell, 19 Tex. Civ. App. 174, 47 S. W. Rep. 39; Arden *v.* Arden, 1 Johns. Ch. 313; Bailey *v.* Jackson, 16 Johns. 210; Jackson *v.* Hotchkiss, 6 Cow. 401; McLellan *v.* Crofton, 6 Greenl. 307, 334; Farmers' Bank *v.* Leonard, 4 Harr. (Del.) 536. *Contra*, Dedlake *v.* Robb, 1 Woods, 680.

"The presumption of payment

which throws on the creditor the burden of proving non-payment.[41]

may be rebutted by countervailing evidence, i. e. an unconditional and unqualified acknowledgment or admission, either express or implied, on the part of defendant, within twenty years of the justness of the claim, and that it is still due; by the insolvency or absence from the state of the debtor, which must apply to the last twenty years; and by such other facts and circumstances which when proved would render payment so improbable that the jury would be constrained by the evidence to believe the debt had not been paid." De Ford *v.* Green, 15 Del. 316, 40 Atl. Rep. 1120.

The presumption is equal to direct proof of payment and will prevail until overcome by direct proof of facts from which nonpayment may be clearly inferred. Richards *v.* Walp, 221 Pa. 412, 70 Atl. Rep. 815.

The condition of the debtor as to solvency or other circumstances may repel the presumption. Connecticut Mut. Life Ins. Co. *v.* Dunscomb, 108 Tenn. 724, 69 S. W. Rep. 345, 91 Am. St. Rep. 769, 58 L. R. A. 694.

The question is one of fact. Lewis *v.* Schwenn, 93 Mo. 26, 2 S. W. Rep. 391, 3 Am. St. Rep. 511.

Where the evidence, if believed by the jury, was sufficient to rebut the presumption of fact raised by the delay in making the demand and was sufficiently convincing to satisfy the jury that the plaintiff did not receive in his weekly pay envelope wages for extra work done by him, it was held that there was much more than a scintilla of evidence which could not be withheld from the jury. Snyder *v.* Steinmetz, 6 Pa. Super. Ct. 341.

[41] Luther *v.* Crawford, 213 Ill. 596, 73 N. E. Rep. 430, 2 Whart. Ev., § 1360. Whether the presumption could always be rebutted by evidence of nonpayment, see Giles *v.* Baremore, 5 Johns. Ch. 545; Fox *v.* Phelps, 20 Wend. 437, affi'g 17 Id. 393.

"The legal presumption of payment arising from lapse of twenty years in case of a bond or specialty does nothing more than shift the burden of proof. Within twenty years the law presumes that the debt has remained unpaid, and throws the burden of proving payment upon the debtor. After twenty years the creditor is bound to show, by something more than his bond, that the debt has not been paid, and this he may do because the presumption raises only a *prima facie* case against him." In re Devereax, 184 Pa. St. 429, 432, 39 Atl. Rep. 225.

"The legal effect of this presumption is to shift the burden of proof or rather to add to the burden of proof resting upon the creditor." Luther *v.* Crawford, 116 Ill. App. 351, aff'd 213 Ill. 596, 73 N. E. Rep. 430.

The proof must be convincing to overcome the presumption.

The presumption applies to any obligation that can be extinguished by an act of payment, such as a judgment,[42] or a sealed obligation,[43] or an assessment,[44]— as distinguished from a covenant which must be released by deed.[45] This presumption is not, like the statute of limitations, a mere bar to the remedy; but is a *prima facie* extinguishment of the debt; [46] not however available to support an allegation of payment as a ground of affirmative relief.[47]

Seymour *v.* Alkire, 47 W. Va. 302, 34 S. E. Rep. 953.

[42] Boardman *v.* De Forrest, 5 Conn. 1; Miller *v.* Smith, 16 Wend. 425, rev'g 14 Id. 188. And a justice's judgment, before the short limitation of the present statute. Fairbanks *v.* Wood, 17 Wend. 329; Johnson *v.* Burrell, 2 Hill, 238.

A long line of cases has established the rule that a judgment is presumed to have been satisfied after the lapse of twenty years, " unless there are circumstances to account for the delay." This presumption of satisfaction arising from the lapse of time applies to every species of security for the payment of money, " whether bond, mortgage, judgment, or recognizance." Biddle *v.* Girard Nat. Bank, 109 Pa. St. 349.

[43] For instance, a bond. Higginson *v.* Mein, 4 Cranch, 415. See also Norvell *v.* Little, 79 Va. 141. But not administration bonds. 2 Whart. Ev., § 1360. A mortgage. Jackson *v.* Pierce, 10 Johns. 414. A sealed award. Smith *v.* Lockwood, 7 Wend. 241. Rent accrued on a covenant, but not the covenant itself. Central Bank *v.* Heydon, 48 N. Y. 260.

[44] Mayor, &c. of N. Y. *v.* Colgate, 12 N. Y. 140.

[45] Lyon *v.* Adde, 63 Barb. 89; Central Bank *v.* Heydon, 48 N. Y. 260.

[46] Reed *v.* Reed, 46 Pa. St. 239. The fact that a note is statute barred is not conclusive evidence that it has been paid. Pratt *v.* Huggins, 29 Barb. 277.

" 'The presumption which the law raises after the lapse of twenty years that a bond or specialty has been paid is in its nature essentially different from the bar interposed by the statute of limitations to the recovery of a simple contract debt. The latter is a prohibition of the action, the former *prima facie* obliterates the debt. The bar is removed by nothing less than a new promise to pay or an acknowledgment consistent with such a promise. The presumption is rebutted, or, to speak more accurately, does not arise when there is affirmative proof, beyond that furnished by the specialty itself, that the debt has not been paid, or where there are circumstances that sufficiently account for the delay of the creditor.' " O'Hara *v.* Corr. 210 Pa. 341, 59 Atl. Rep. 1099,

[47] Lawrence *v.* Ball, 14 N. Y.

The statute [48] declaring that the presumption arises from the lapse of twenty years, by implication forbids a presumption of payment from mere lapse of time, short of twenty years.[49] But it may be presumed from other circumstances in connection with the lapse of less time.[50] The statute presumption is not that payment was made at the expiration of the limit, but at some prior indefinite time, or when the obligation became due.[51]

The common law presumption may be *repelled*, not only by evidence of acknowledgment or part payment, but by other circumstances—for instance, proceedings of enforcement, such as a statute foreclosure of a mortgage;[52] or, in case of a judgment,[53] return of an execution unsatisfied

477; Brady *v.* Begun, 36 Barb. 533.

[48] For the successive N. Y. statutes which leave the rule a very complex one, compare 2 R. S. 301 (3 Id. 6th ed. 570), §§ 46–48; Code Pro., § 90 (3 R. S. 6th ed. 477), Code Civ. Pro., §§ 376 (as am'd 1877), 381, 395. But by N. Y. Code Civ. Pro. the presumption avails under an allegation that the action was not commenced, or the proceeding not taken, within the time limited by the statute (§ 378).

[49] Ingraham *v.* Baldwin, 9 N. Y. 45; Gray *v.* Seeber, 53 Hun, 611, 6 N. Y. Supp. 802, 917. and see Daby *v.* Ericsson, 45 N. Y. 786.

[50] Flagg *v.* Ruden, 1 Bradf. 192; Bander *v.* Snyder, 5 Barb. 63. See Jameson *v.* Rixey, 94 Va. 342, 26 S. E. Rep. 861, 64 Am. St. Rep. 726.

[51] Martin *v.* Gage, 9 N. Y. 398.

[52] Jackson *v.* Slater, 5 Wend. 295, and see Levers *v.* Van Buskirk, 7 Watts & S. 70.

"Facts and circumstances which reasonably tend to establish improbability of payment are always admissible. Thus it has been held, 'that the institution of legal proceedings, though irregular, by the creditor within the time relied on to raise the presumption of payment, would rebut such presumption which might otherwise have arisen.' " Allison *v.* Wood, 104 Va. 765, 52 S. E. Rep. 559, 7 Ann. Cas. 721.

But it would seem such proceedings should not be allowed to have this effect if instituted for the sole purpose of repelling the presumption of payment, and not in good faith, with the sincere object of recovering the debt claimed. Id.

[53] Henderson *v.* Cairns, 14 Barb. 15, compare Code Civ. Pro., § 377.

If within twenty years one does not invoke a *scire facias* to enforce his claim under a judgment, the presumption of payment of the said claim arises. Biddle *v.* Girard Nat. Bank, 109 Pa. St. 349.

within the twenty years; or by evidence of the debtor's insolvency,[54] for which purpose other judgments, recovered by third persons, within the limit, and remaining unsatisfied, may be put in evidence.[55] And in aid of evidence of insolvency, evidence of absence,[56] or distant residence,[57] is competent. The statute, on the other hand, excludes every species of evidence to rebut the presumption, except that of part payment or a written acknowledgment.[58] Proof of actual non-payment is not available.[59]

Though there is a legal presumption of payment of a judgment after a lapse of twenty years, this lapse of time is *prima facie* evidence of payment only and "may be rebutted by competent satisfactory proof of some acknowledgment or recognition of said judgment within twenty years." Maxwell *v.* Devalinger, 18 Del. 504, 47 Atl. Rep. 381.

[54] Waddell *v.* Elmendorf, 10 N. Y. 170, affi'g 12 Barb. 585; Farmers' Bank *v.* Leonard, 4 Harr. (Del.) 536. See also DeFord *v.* Green, 15 Del. 316, 40 Atl. Rep. 1120.

A circumstance to rebut the presumption is the inability of the debtor to pay within twenty years. "There are convincing reasons for ruling that proof of the insolvency of the debtor alone will not rebut the presumption. An insolvent may be possessed of property or be in receipt of an income, and have means of payment; but proof of positive inability to pay is in effect proof that payment could not have been made." In re Devereax, 184 Pa. St. 429, 39 Atl. Rep. 225.

[55] Waddell *v.* Elmendorf (above). And even judgments which have been satisfied may be competent for the consideration of the jury. Levers *v.* Van Buskirk, 4 Penn. St. 309, 314.

[56] Boardman *v.* De Forrest, 5 Conn. 1.

Though the presumption may be rebutted by absence from the state, this is not so when it has been shown that at some time within the twenty years the debtor has been in the state, "possessed of sufficient property," with which to make payment. DeFord *v.* Green, 15 Del. 316, 40 Atl. Rep. 1120.

[57] M'Kender *v.* Littlejohn, 4 Ired. N. C. L. 498. Whether absence and insolvency are alone sufficient to rebut the presumption, compare Kline *v.* Kline, 20 Penn. St. 503, 508; Roberts *v.* Judd, 5 Vt. 236, and McLellen *v.* Crofton, 6 Greenl. 307, 334.

[58] Morey *v.* Farmers' Loan & Trust Co., 14 N. Y. 302; Malloy *v.* Vanderbilt, 4 Abb. New Cas. 127, 132.

[59] Fisher *v.* The Mayor, &c., 67 N. Y. 73, 80, rev'g 6 Hun, 64, 3 Id. 648.

II. ACCORD AND SATISFACTION

26. Mode of Proof, and Effect.

This defense ought to be pleaded; but may be inserted by amendment, at the trial.[60] Under this answer, evidence of payment may avail if plaintiff is not misled.[61] The burden is on the defendant to show that the accord and satisfaction was accepted by the plaintiff. An accord, executory, with tender of performance, is not a bar.[62] Tender is not enough, even as to costs.[63]

[60] Brett *v.* First Univ. Soc., 63 Barb. 610, 613.

Accord and satisfaction must be specially pleaded. Fogil *v.* Boody, 76 Conn. 194, 56 Atl. Rep. 526. See also Habrich *v.* Donohue, 51 App. Div. 375, 64 N. Y. Supp. 604.

But under the Vermont statutes, accord and satisfaction may be available under the general issue when written notice is given to the plaintiff that evidence thereof will be offered and relied upon. Seaver *v.* Wilder, 68 Vt. 423, 35 Atl. Rep. 351.

[61] Prouty *v.* Eaton, 41 Barb. 409. It is not the appropriate allegation to admit evidence of compromise. Williams *v.* Irving, 47 How. Pr. 440, 442.

[62] 1 Abb. N. Y. Dig. 15; Kromer *v.* Heim, 44 Super. Ct. (J. & S.) 237, 246.

Facts which simply show a promise or agreement by a creditor to accept an amount less than his debt, which agreement is not executed by the payment of money, or the giving of additional security or some other new consideration, are not sufficient to show an accord and satisfaction. Bowen *v.* Waxelbaum, 2 Ga. App. 521, 58 S. E. Rep. 784; Phinizy *v.* Bush, 129 Ga. 479, 59 S. E. Rep. 259.

A debtor's promise to pay part of a debt by giving his creditor a paper called an assignment covering prospective wages, even though agreed to by his creditor, is not an accord and satisfaction where the agreement is not presented to or accepted by the debtor's employer, who continues as before to pay the debtor his wages. Citizens' Nat. Bank *v.* Marks, 34 Pa. Super. Ct. 310.

The trial court was correct in charging that the burden of proof was upon the defendant to show an accord and satisfaction. And the fact that the plaintiff suing for deductions made in his salary while working for the defendant consented to receive an amount which on the defendant's books appeared due him at the time of leaving the defendant's employ but refused to sign a receipt in full was insufficient to establish an accord and satisfaction. Rosenfeld *v.* New, 10 N. Y. Supp. 232.

[63] Noe *v.* Christie, 51 N. Y. 270, 273.

In respect to a liquidated and undisputed debt, payment of part in full is not enough,[64] even if the less sum came from a third person;[65] but evidence that it was loaned by him in good faith for the purpose of obtaining the satisfaction agreed on is enough to establish satisfaction.[66] The payment of a less sum if accompanied with anything given by the debtor to the creditor which the law can consider a benefit—such as a release of cross demands—and accepted as a satisfaction of the whole, is a good accord and satisfaction.[67] In respect to a debt uncertain in

"'The retention of the amount forwarded, declared to be in full settlement of the claim held by the person to whom it is sent, coupled with a failure within a reasonable time to decline the proposition, will raise a conclusive presumption of an acceptance of the terms and conditions set forth in the proposal. While of course a party cannot be bound by a settlement unless he assents to its terms, still this assent may be implied from the circumstances; and conduct inconsistent with a refusal would raise a presumption of assent, upon which the other party would have a right to act.'" Redmond *v.* Atlanta & Birmingham Air-line Ry., 129 Ga. 133, 58 S. E. Rep. 874.

"The silence of a debtor after he is notified the creditor will not accept the sum proffered in full payment but is willing to give credit for it, is a circumstance to be considered in determining whether or not an accord and satisfaction occurred; and courts have held that it does not occur because the minds of the parties did not meet in an agreement that the demand should be satisfied by the payment." Bahrenburg *v.* Conrad Schopp Fruit Co., 128 Mo. App. 526, 107 S. W. Rep. 440.

Where the plaintiff delivered goods to the defendant, who returned part thereof as not ordered and a few months later sent the plaintiff a check indorsed "amount of check in payment all bills to date," and the plaintiff struck out the indorsement and collected it and wrote the defendant a note saying that the defendant owed a small amount of interest, but nothing further about a balance still due, it was held that there was an accord and satisfaction. Smith *v.* Bronstein, 107 N. Y. Supp. 765.

[64] Ryan *v.* Ward, 48 N. Y. 204; Gussow *v.* Beineson, 76 N. J. L. 209, 68 Atl. Rep. 907; Canadian Fish Co. *v.* McShane, 80 Nebr. 551, 114 N. W. Rep. 594,. 127 Am. St. Rep. 791, 14 L. R. A. N. S. 443.

[65] Bunge *v.* Koop, 48 N. Y. 225.

[66] Grocers' Bank *v.* Fitch, 1 Supm. Ct. (T. & C.) 651, affi'd in 58 N. Y. 623.

[67] Pardee *v.* Wood, 8 Hun, 584.

The giving of a receipt in full although evidence of an accord and satisfaction is not conclusive.

amount,[68] or the existence of which is disputed,[69] a less sum accepted in full constitutes an accord and satisfaction.

Burrill *v.* Crossman, 91 Fed. Rep. 543, 33 C. C. A. 663.

[68] Brett *v.* First Univ. Soc. of Brooklyn, 63 Barb. 610, 617; Burrill *v.* Crossman, 91 Fed. Rep. 543, 33 C. C. A. 663.

"The plaintiff, having a cause of action against the defendant, unliquidated with respect to amount, for personal injuries claimed to have been caused by its negligence, and having presented a claim for his damage or injury as he was required to do, and having received from the city a stated sum of money on his claim, there being no express agreement that it should be in satisfaction either in whole or in part of the cause of action, the presumption is that it was intended by the parties as a full recompense for the injury, and operates as an accord and satisfaction, barring a subsequent action to recover damages for the same injury." Bowman *v.* Ogden City, 93 Utah, 196, 93 Pac. Rep. 561.

"'A demand is not liquidated even if it appears that something is due, unless it appears how much is due, and when it is admitted that one of two specific sums is due, but there is a genuine dispute as to which is the proper amount, the demand is regarded as unliquidated.' Chicago, Milwaukee & St. Paul Ry. Co. *v.* Clark, 178 U. S. 353, 20 S. Ct. 924, 44 L. ed. 1099.

"Where certain items of an account were disputed, and certain items were undisputed, and defendant paid plaintiff only the amount of the undisputed items, the court held that the dispute over certain items made the account an unliquidated one, and that plaintiff, by accepting the amount of the undisputed items with notice that it was sent as payment in full, was precluded from recovering the balance of his demand." See Chicago, Milwaukee & St. Paul Ry. Co. *v.* Clark, 178 U. S. 353, 20 S. Ct. 924, 44 L. ed. 1099.

Where a debtor being in failing circumstances and contemplating bankruptcy offered his creditor a percentage of his debt as a settlement in full, and the creditor dissuaded him from going into bankruptcy, accepted his alternative offer and received the money, this was held a good accord and satisfaction. Melroy *v.* Kemmerer, 218 Pa. 381, 67 Atl. Rep. 699, 120 Am. St. Rep. 888, 11 L. R. A. N. S. 1018.

[69] New Amsterdam Casualty Co. *v.* Meaker, 128 Mo. App. 183, 106 S. W. Rep. 561; Carter *v.* Carter, 129 Mo. App. 467, 107 S.W. Rep. 467; Howard *v.* Norton, 65 Barb. 161. As to "jump settlements," see Calkins *v.* Griswold, 11 Hun, 208; Hamilton, &c. Co. *v.* Goodrich, 6 Allen, 191, 199.

"'Ordinarily the retention of a check enclosed in a letter which refers to the amount as the balance due on accounts between parties will not be held to be an

Acceptance in satisfaction having been shown, the relative value of the thing accepted and the debt is immaterial.[70] Upon showing that the creditor received an obligation of a third person, to be satisfaction if paid at maturity, the burden is on defendant to show that it was so paid.[71]

A substituted executory agreement is not an accord and satisfaction unless it gives a cause of action.[72]

The plaintiff cannot rebut the evidence of an accord and

accord and satisfaction, so as to bar an action for the balance due. It is only in cases where a dispute has arisen between the parties as to the amount due, and a check is tendered on one side in full satisfaction of the matter in controversy, that the other party will be deemed to have acquiesced in the amount offered by an acceptance and retention of the check.'" Windmuller *v.* Goodyear Tire, etc., Co., 123 App. Div. 424, 107 N. Y. Supp. 1095.

The consideration for the accord and satisfaction is to be found in the controversy existing between the parties. Missouri, etc., Coal Co. *v.* Consolidated Coal Co., 127 Mo. App. 320, 105 S. W. Rep. 682.

[70] Grocers' Bank of N. Y. *v.* Fitch, 1 Supm. Ct. (T. & C.) 651, affi'd on Genl. Term opinion, 58 N. Y. 623.

But the creditor must receive something of legal value to which he had no previous right. Demeules *v.* Jewel Tea Co., 103 Minn. 150, 114 N. W. Rep. 733, 123 Am. St. Rep. 315, 15 L. R. A. N. S. 954.

[71] Dolsen *v.* Arnold, 10 How. Pr. 528.

[72] Kromer *v.* Heim, 44 Super. Ct. (J. & S.) 237, 246; Billings *v.* Vanderbeck, 23 Barb. 546.

"An accord unperformed, consisting of mutual promises, and thus having a new consideration, is binding upon the parties, and an action will lie for the breach of it. Where mutual promises give a right of action, there is an accord and satisfaction." Carstens *v.* Schmalholz, 16 Daly (N. Y.), 26.

"If one having a debt or claim against another satisfies or releases it in consideration of an executory promise by the party owing the debt or duty, he cannot afterwards enforce his original cause of action upon a mere failure of the other party to perform his promise, for he has a remedy to compel performance." Morehouse *v.* Second Nat'l Bank, 98 N. Y. 503.

Where the debtor agreed to pay his claim by giving a portion of his estate to the creditor by will, to which arrangement the creditor assented on the condition that the will be not revoked, it was held that by this reservation the creditor had reserved her right to recover upon the original claim and hence there was no accord and satis-

satisfaction by showing a new promise,[73] or that the security he accepted was void for his own usury.[74]

III. ACCOUNT STATED

27. Mode of Proof, and Effect.

This defense, if available, must be pleaded.[75] It may be proved by evidence of the reading over of the items (even though they were all on one side), and agreeing upon the balance or amount due.[76] An account stated is presumed to include all previous transactions[77] prior to the day on which it was had, including previous accounts stated.[78]

faction. Colt *v.* O'Connor, 59 Misc. 83, 109 N. Y. Supp. 689.

[73] Stafford *v.* Bacon, 1 Hill, 532.

[74] La Farge *v.* Herter, 9 N. Y. 241, affi'g 11 Barb. 159, 4 Id. 346.

[75] Kock *v.* Bonitz, 4 Daly, 117, 120. Without allegation of payment or satisfaction at common law it is not pleadable (Bump *v.* Phœnix, 6 Hill, 308); nor under the new procedure, except in peculiar cases resting on equitable grounds.

"By an 'account stated' is meant that the parties have had an accounting between themselves, and have agreed upon a balance or sum owing by one to the other, and which the said debtor has agreed to pay." Davis *v.* Boswell, 77 Mo. App. 294.

Where the plaintiff offered in evidence a paper which he claimed was evidence of an account stated by reason of actions of the defendant regarding it, the court refused to consider it as such inasmuch as the pleadings had failed to set it up or show that the parties relied upon it as determining their rights. Bump *v.* Cooper, 20 Ore. 527, 26 Pac. Rep. 848.

[76] Id. Or in other modes stated at Chapter XXIII, paragraph 4 of this vol. An account is not usually conclusive on the party rendering it. Schettler *v.* Smith, 34 Super. Ct. (J. & S.) 17.

Thus, it has been held that an account stated was established by proof that one of the parties had, after an examination of the other party's ledger, during which examination a certain credit was pointed out to him, appeared satisfied with the ledger statement, and had stated that he would pay what he owed, even though he did later object to it. Bean *v.* Wheatley, 13 App. D. C. 473.

[77] Dutcher *v.* Porter, 63 Barb. 15; McDavid *v.* Ellis, 78 Ill. App. 381.

And it has been held that the

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[78] Dorsey *v.* Kollock, 1 N. J. L. 35. See McClain *v.* Schofield, 74 Hun, 437, 26 N. Y. Supp. 700; Manchester Paper Co. *v.* Moore, 104 N. Y. 680, 10 N. E. Rep. 861.

Where a statement of account is alleged by defendant as a defense, not as a counterclaim, the new procedure does not require plaintiff to controvert it in pleading, unless a reply be ordered by the court.[79]

The statement of the account having been proved between parties who stood on equal terms, the burden is on plaintiff to show the fraud, concealment or mistake on which he relies as ground for opening it.[80] It is a general rule, applicable with due regard to the circumstances of each case, that where the accounts have been shown to be erroneous to a considerable extent, both in amount and in the number of the items, or where fiduciary relations exist, and a less considerable number of errors are shown, or where fiduciary relations exist and one or more fraudulent omissions or insertions in the account are shown, the court opens the account, and does not merely surcharge and falsify.[81]

giving of a note was *prima facie* evidence of an accounting of all demands between the parties "up to the date of the note." In re Callister, 153 N. Y. 294, 47 N. E. Rep. 268, 60 Am. St. Rep. 620. See also Wright *v.* Wright, 74 Hun, 138, 26 N. Y. Supp. 238.

[79] Welsh *v.* German American Bank, 42 Super. Ct. (J. & S.) 462, affi'd in 73 N. Y. 424; Code Civ. Pro., §§ 514, 516. In an action to recover a single item alleged to have been fraudulently omitted, a reopening of the account generally would be a departure from the pleadings. McMichael *v.* Kilmer, 76 N. Y. 36, rev'g 12 Hun, 336.

[80] Brown *v.* Van Dyke, 8 N. J. Eq. (4 Halst.) 795, 803; Des Jardins *v.* Hotchkin, 142 App. Div. 845, 127 N. Y. Supp. 504.

See also Barr *v.* Lake, 147 Mo. App. 252, 260, 126 S. W. Rep. 755; Little *v.* McClain, 134 App. Div. 197, 118 N. Y. Supp. 916.

An account stated is *prima facie* only an admission as to the accuracy of the account and it may be impeached by proof of fraud, mistake or errors, the burden of proof in this regard resting upon the party so impeaching. Ware *v.* Manning, 86 Ala. 238, 5 So. Rep. 682. See also Wurlitzer Co. *v.* Dickinson, 153 Ill. App. 36, 41.

[81] Williamson *v.* Barbour, L. R. 9 Ch. Div. 529, s. c., 37 L. T. R. N. S. 698, 699.

"The general rule undoubtedly is, that where no fiduciary relation exists between the parties and no great inequality in the mental or business capacity of the parties, formal settlements closed by receipt or note will not be opened altogether except for fraud, or such a number of errors and mistakes

An account expressly stated by both parties, being shown, and unimpeached, plaintiff cannot always recover on the original cause of action;[82] but if there is a failure to prove the stating of the account, defendant may fall back on the accounts and prove that there is, in fact, a balance due him, unless his pleading is so framed as to show that he relies solely on the account stated.[83]

IV. COMPROMISE AND COMPOSITION

28. Mode of Proof, and Effect.

It is enough to prove a substantial controversy upon a claim made or resisted, in good faith, by the defendant, and a compromise made by him on the settlement of it.[84] In the

as will demonstrate that justice cannot be administered without taking the accounts *de novo*." Patton *v.* Cone, 1 Lea (Tenn.), 14.

Where it is shown that there has been gross mistake in the account stated, the whole account may be taken *de novo*, but the gross mistake must affect all the items involved. Branger *v.* Chevalier, 9 Cal. 353.

[82] White *v.* Whiting, 8 Daly, 23, 27. Compare Milward *v.* Ingram, 2 Mod. 48, with Bump *v.* Phœnix (above cited); Volkening *v.* De Graaf, 81 N. Y. 268; Young *v.* Hill, 67 N. Y. 174, 175, s. c., 23 Am. Rep. 99.

Where an account stated was established, the court refused to allow representatives of the deceased debtor to go behind it and invoke the statute of limitations against items going to make up the account. Peters' Estate, 20 Pa. Super. Ct. 223.

[83] Goings *v.* Patten, 1 Daly, 168, s. c., 17 Abb. Pr. 339.

Although a plaintiff might refer to transactions prior to the statement of account for the purpose of showing that an account had existed between the parties and establishing a foundation for the account stated sued upon, he could not abandon this cause of action and fall back upon the original items, since, having sued upon an account stated, he must stand or fall upon that cause of action. Barr *v.* Lake, 147 Mo. App. 252, 126 S. W. Rep. 755.

Where the existence of the account stated is in issue it has been held that the defendant may prove payment of the items upon which the plaintiff has based his claim. Kaminsky *v.* Mendelson, 25 Misc. (N. Y.) 500, 54 N. Y. Supp. 1010.

[84] See Dixon *v.* Evans, L. R. 5 H. L. 606.

"'The rule is well-settled that an agreement of compromise is supported by a sufficient consideration where it is in settlement of a

absence of evidence of fraud, misrepresentation or undue advantage taken, the non-beneficial character of the compromise is not relevant.[85] A compromise having been shown, mistake of law is immaterial unless caused by the advice of

claim which is unliquidated, where it is in settlement of a claim which is disputed, or where it is in settlement of a claim which is doubtful. There are cases to the effect that in order to support a compromise in avoidance of litigation the claim must be an actual one, founded upon a colorable right about which there is room for honest doubt and actual dispute, and with some legal or equitable foundation, and not one which is without foundation; and is known to be so, or is in its nature an illegal claim out of which no cause of action can arise in favor of the person asserting it. The usual test, however, as to whether a compromise and settlement is supported by a sufficient consideration is held to be not whether the matter in dispute was really doubtful, but whether or not the parties *bona fide* considered it so, and that the compromise of a disputed claim made *bona fide* is upon a sufficient consideration, without regard to whether the claim be in suit or not. The law favors the avoidance or settlement of litigation, and compromise in good faith for such purposes will be sustained as based upon a sufficient consideration, without regard to the merits of the controversy or the character or validity of the claims of the parties, and even though a subsequent judicial decision may show the rights of the parties to have been different from what they at the time supposed. The real consideration which each party receives under such a compromise is, according to some authorities, not the sacrifice of the right, but the settlement of the dispute.'" Hutchinson *v.* Mt. Vernon Water, etc., Co., 49 Wash. 469, 95 Pac. Rep. 1023.

An agreement to compromise is based upon good consideration where one of the parties thereto is an intending litigant who *bona fide* forbears his right to litigate, and the claim which is given up is to be measured not by the state of the law as it is ultimately discovered to be, but by the knowledge of the person who at the time has to judge and make the concession. Blount *v.* Wheeler, 199 Mass. 330, 85 N. E. Rep. 477, 17 L. R. A. N. S. 1036.

[85] Id.

A broker who receives one-half of the commission demanded under a valid agreement cannot afterwards recover the full amount where there has been no fraud practiced upon him and no coercion was used. His fears that he might lose the whole of the commissions if he did not agree to take the half, offers no reason for declaring that his agreement is not binding upon him. McAfee *v.* Henry, 110 S. W. Rep. (Tex. Civ. App.) 143.

the other party.[86] Evidence of fraud or oppression may be met by showing ratification after knowledge of it.[87]

A *composition* with creditors, including plaintiff, must be alleged (under the new procedure), in order to be admissible as a bar.[88] The facts necessary to make it binding should be proved,[89] including delivery of the new notes or other securities, or at least, tender of them, made and kept good (and in that case the securities must be brought into court for delivery), unless there is evidence that plaintiff waived or dispensed with tender. To avoid the composition the debtor's fraud on the creditor by giving others a secret advantage may be proved.[90]

V. TENDER

29. Necessity, and Mode of Proof.

Tender cannot be proved where keeping the tender good and paying into court are necessary, unless those acts are

[86] Taplin *v.* Wilson, 4 Hun, 244.

Where a compromise has once been made eventhough on terms which are admittedly very oppressive and even though it was entered into for the purpose of avoiding a vexatious and tedious litigation, it is binding upon the parties if voluntarily made. Costen *v.* Price, 110 S. W. Rep. 390, 33 Ky. L. 553.

[87] Stebbins *v.* Niles, 25 Miss. 267; Adams *v.* Sage, 28 N. Y. 103.

[88] Smith *v.* Owens, 21 Cal. 11.

[89] Warburg *v.* Wilcox, 7 Abb. Pr. 336, and cases cited; Bump on Composition, 72.

Where the defendant paid the plaintiff, a poor, ignorant negro, uneducated and unused to the English language and unable to speak it with any degree of clearness, the sum of $50 in full settlement for serious injuries received in his employ, and took a receipt therefor which the defendant now relies upon in bar to a suit to recover for such injuries, the court will be slow to enforce the settlement against such a person unless on the clearest proof that it was freely made and fairly obtained. Keller & Brady Co. *v.* Berry, 121 S. W. Rep. (Ky.) 1009.

[90] Beach *v.* Ollendorf, 1 Hilt. 41.

But a court of equity will not at the instance of the creditor set aside a composition agreement on the ground that the debtor had accorded to other creditors secret advantages when the evidence shows that he himself had entered into the agreement in consideration of a promise of the debtor's brother

also alleged.[91] Where the party making tender omits to produce the money in consequence of the other party's refusal to act, it is not enough to prove his declaration that he had the money ready, but he must at least give sufficient evidence that at the time of demand of performance he had such means of procuring the money as to entitle him to go to the jury on the question of his being then able to make the payment.[92] A tender of the check of the party for money,

to pay him a sum of money at once. O'Brien *v.* Greenebaum, 92 Cal. 104, 28 Pac. Rep. 214.

[91] Becker *v.* Boon, 61 N. Y. 317 (DWIGHT, C., dissented); Kortright *v.* Cady, 5 Abb. Pr. 358, s. c., less fully, 23 Barb. 490, but see reversal, 21 N. Y. 343.

"By making a tender of $40. for damages sustained by appellee, appellant must be held to have admitted its liability to pay damages to that amount and therefore the only question properly before the trial court and before this court on this appeal, was and is, the amount of damages actually sustained by appellee." Cassel *v.* Chicago, &c. Ry. Co., 142 Ill. App. 593.

"A tender of a part of the amount claimed to be due under a contract involving items which may be segregated, is no more than an admission of a contract and that the amount tendered is due thereon. The value of the services rendered still being an issue, the appellant could under the statute plead any counterclaim upon any cause of action arising out of the contract or transaction set forth in the complaint or connected with the subject of the action." LaRault *v.* Palmer, 51 Wash. 664, 99 Pac. Rep. 1036, 21 L. R. A. N. S. 354.

Tender of the exact sum due upon a mortgage debt in accordance with the terms of the instrument, operates to discharge the mortgage lien and thereafter the only liability is upon the bond. By wrongfully refusing to take the money, the creditor violates his own contract and the debtor's right. By such a wrong he cannot put upon defendant an unreasonable burden of keeping the tendered money, and if the creditor afterwards demands it, the debtor is entitled to a reasonable opportunity to comply with the demand. Security State Bank *v.* Waterloo Lodge, 85 Neb. 255, 122 N. W. Rep. 992.

[92] Goodrich *v.* Sweeny, 36 Super. Ct. (J. & S.) 320, 325.

"A creditor is not bound to accept less than the full amount of his demand, and a tender of part only of a single entire demand is of no effect; it makes no difference that the insufficiency in amount arises from an honest mistake on the part of the debtor; the mistake must be regarded as his mistake." Milligan *v.* Marshall, 38 Pa. Super. Ct. 60.

if not objected to, is sufficient.[93] In case of the tender of a written instrument, an absolute refusal to accept any such

" 'Actual ability accompanied by the immediate physical possibility of reaching out and laying hold of the money or thing to be delivered and making a manual proffer of it or placing it in a position so that the tenderee, if he choose may lay hold of it, must not only exist as a fact, but it must be made to appear at the time that the party has the money or thing ready for actual delivery.' " Greenwood *v.* Watson, 171 Fed. 619, 96 C. C. A. 421.

A tender of a sum less than "the amount claimed, and payment thereof into court, is a conclusive admission of the indebtedness to the extent of the tender, regardless of the final result of the action, and vests the title thereto in the plaintiff, although he does not accept it and makes no effort to secure the money; and not only does the defendant lose all right to it, but the court itself has no power to make an order or render a judgment in the same action which effects a retransfer of the title. Mann *v.* Sprout, 185 N. Y. 109. The plaintiff, in proceeding after a tender and deposit, simply runs the risk of paying defendant's costs, if the recovery falls short of the amount tendered; while the defendant takes the risk of losing the amount tendered in the event of his succeeding in the action. Taylor *v.* Brooklyn El. R. Co., 119 N. Y. 561, 23 N. E. Rep. 1106. The fact, however, that defendant has made a tender into court, thereby admitting the contract or duty and the right of the plaintiff thereon to the sum tendered, does not prevent defendant from opposing any claim by plaintiff, beyond the sum tendered, upon any ground consistent with an admission of the original contract or cause of action." Heller *v.* Katz, 62 Misc. Rep. 266, 114 N. Y. Supp. 806.

Where the plaintiffs in their complaint claimed a sum for labor and services, and the defendant as a separate defense claimed damages and pleaded "that the defendant now tenders into court the difference between plaintiff's claim and defendant's damages which sum the defendant is ready, able and willing to pay to plaintiffs," it was held that the plaintiffs were at least entitled to judgment for the sum so conceded by the pleadings. Gottlieb *v.* Bernhard, 117 N. Y. Supp. 882.

[93] Mitchell *v.* Vermont Copper Mining Co., 67 N. Y. 280, affi'g 40 Super. Ct. (J. & S.) 406, 47 How. Pr. 218.

But where partner in a firm to whom a firm debtor tendered his check payable to the firm, refused the same and requested the debtor to make the check payable to him individually, it was held that upon the debtor refusing to do so, there was no valid tender, since the partner was not obliged to receive a check and when consenting to

instrument excuses the omission actually to execute it before tender.[94] Where goods to be tendered are ponderous and bulky, it is enough if they are placed in the power of the party to whom they are tendered.[95] If warehouse receipts

do so had a right to dictate its form. Murphy *v.* Gold & Stock Tel. Co., 3 N. Y. Supp. 804.

An agent of an insurance company in cancelling an insurance policy, sent the secretary of the plaintiff company his draft drawn on his company for the amount of the unearned premium. The court held that even assuming that the sending of the draft was not such a payment or tender thereof sufficient to effect the cancellation of its policy, yet it must be deemed sufficient for that purpose where it appeared that the secretary, who was himself an insurance agent and presumably knew what was a proper tender, retained the draft without offering any objection thereto and treated it as having the effect of cancelling the policy. Lampesas Hotel, etc., Co. *v.* Home Ins. Co., 17 Tex. Civ. App. 615, 43 S. W. Rep. 1081.

[94] Blewett *v.* Baker, 58 N. Y. 611, affi'g 37 N. Y. Super. Ct. (J. & S.) 23, and see Rinaldo *v.* Housmann, 1 Abb. New Cas. 312.

Where the defendant was ready, able and willing to give a good and sufficient deed to certain premises and expressed a willingness so to do, but his offer was absolutely and unconditionally rejected by plaintiff, it was held that a more formal tender was waived and the sufficiency and formality thereof may not thereafter be questioned. Walsh *v.* Colvin, 53 Wash. 309, 101 Pac. Rep. 1085.

[95] Hayden *v.* Demets, 53 N. Y. 426, affi'g 34 Super. Ct. (J. & 344. A seller's tender of goods, to which he has not good title, is not enough. Croninger *v.* Crocker, 62 N. Y. 151, 157.

Where a contract required the delivery of certificates of stock to several parties who were at the same time obliged to pay the holder of the stock, and no place of delivery was mentioned, it was held that the deposit of the stock certificates in a business institution in the city in which the contract was made, with a timely notice to the purchasers of this fact, constituted a fair, reasonable and sufficient tender by the holder of the stock. Kauffman *v.* Reader, 108 Fed. Rep. 171, 47 C. C. A. 278, 54 L. R. A. 247.

The defendants agreed to purchase a stock of lithographic stones, relying upon a representation that their weight was not over three tons. The amount delivered proved to be some nine tons, all of which were accepted without examination as to quantity. Upon subsequently discovering that they were charged with the whole amount delivered, the defendants sent the plaintiffs a letter refusing to accept the excess and stating that this excess was placed at the plaintiff's disposal. It was

are tendered, with an order for payment of the charges and delivery of the goods themselves if required, a refusal on account of inability to pay, with no objection as to the sufficiency of the tender, is a waiver of any objection to it.[96] But a tender of bulky articles must be seasonably made, to give opportunity for examination before the close of the day.[97] An anticipatory declaration of refusal to perform, without withdrawing the declaration before the time of performance arrives, excuses the party to whom it is made from performing or offering to perform.[98] Where the party's absence from the State, or being beyond reach, or intentional evasion, is relied on, evidence that he was temporarily absent from his residence is not sufficient.[99]

The authority of the person making the tender may be inferred from slight evidence.[1]

held that an actual manual return of the surplus was not necessary but that the tender as shown in the letter was sufficient. Lamb *v.* Traitel, 12 Misc. 140, 32 N. Y. Supp. 1075.

[96] Hayden *v.* Demets, 53 N. Y. 426, affi'g 34 Super. Ct. (J. & S.) 344. See Stokes *v.* Recknagel, 38 N. Y. Super. Ct. 368, 386.

In McAfee *v.* Wyckoff, 44 Misc. (N. Y.) 380, 89 N. Y. Supp. 996 the court held that the mere delivery of iron castings did not bind the purchaser to accept them and "delivery (was) not complete until there (had) been a reasonable time for examination or inspection."

[97] Croniger *v.* Crocker, 62 N. Y. 151, 158.

[98] Weinberg *v.* Naher, 51 Wash. 591, 99 Pac. Rep. 736, 22 L. R. A. N. S. 956; Smith *v.* Eiger, 143 Ill. App. 552; Shaw *v.* Republic Life Ins. Co., 69 N. Y. 286, modifying 67 Barb. 586. Where the party absolutely refuses to perform, the law does not require the useless act of a tender of performance as a condition precedent. Pettitt *v.* Turner, 2 Supm. Ct. (T. & C.) 608.

Where the plaintiff did all within reason to make a tender, i. e., called upon the defendant with witnesses and a notary public, and offered the amount, but the defendant declined to receive it, and added it would be useless to count the price to her, it was held that there was no necessity of going further in trying to make the tender. Ronaldson & Puckett Co. *v.* Bynum, 122 La. 687, 48 So. Rep. 152.

[99] Hoag *v.* Parr, 13 Hun, 95.

It has been held that one seeking to redeem his property could not

[1] Tacey *v.* Irwin, 18 Wall. 549, 551

VI. RELEASE

30. Mode of Proof, and Effect.

A release under seal is conclusive evidence of its own consideration. To make it admissible in evidence with this effect, it should be pleaded.[2] An allegation of a release will admit evidence of an unsealed instrument purporting to release, together with acts creating an equitable estoppel to the same effect.[3] A release given by one of two joint creditors may be proved in the same cases as where his admissions and declarations might be.[4] A release by one of two co-trustees may be aided by evidence of conduct of the other implying recognition and ratification.[5] Delivery may be presumed of a partial release, indorsed on the original obligation continuing in the possession of the obligee.[6] A trustee

excuse his failure to make a tender of the price therefor by pleading that the several purchasers lived in different parts of the State. Lehman, Durr & Co. *v.* Moore, 93 Ala. 186, 9 So. Rep. 590.

[2] Rosc. N. P. 663; Hitchcock *v.* Carpenter, 9 Johns. 344; Jersey City *v.* North Jersey Street Ry. Co., 78 N. J. L. 72, 73 Atl. Rep. 609.

[3] Cornell *v.* Masten, 35 Barb. 157. See Jaqua *v.* Shewalter, 10 Ind. App. 234, 36 N. E. Rep. 173, 37 N. E. Rep. 1072.

[4] Chapter VII, paragraph 6 of this vol.

[5] Van Rensselaer *v.* Akin, 22 Wend. 549.

In a proper case a release may be presumed from lapse of time, but in order that a release may be presumed it is essential that the party who is presumed to have executed it should have authority to do so. When that person is an individual no difficulty arises. An individual of full age may execute a release as well as make a contract; but when the party is a municipal corporation the authority to execute a release must appear before the execution can be presumed. Jersey City *v.* North Jersey St. Ry. Co., 78 N. J. L. 72, 73 Atl. Rep. 609.

[6] Fitch *v.* Forman, 14 Johns. 172.

The release itself is admissible on an issue as to its delivery. Porter *v.* Metcalf, 84 Tex. 468, 19 S. W. Rep. 696.

It has been held that a release will be presumed to have been delivered on the date which it bears and the fact that the acknowledgment attached thereto bore a later date did not destroy this presumption. Crager *v.* Reis, 16 Daly (N. Y.), 450, 12 N. Y. Supp. 729.

who sets up a release from a *cestui que trust*, must either show actual and adequate consideration, or that it was based upon a settlement at arm's length, or that he gave the *cestui que trust* full information and a fair statement of the trust.[7]

An unqualified sealed release of one of several joint wrongdoers,[8] or joint, or joint and several debtors,[9] at common law releases all; but an unsealed release does not.[10] By the statute, a note or memorandum in writing given by a creditor to a partner after dissolution,[11] or to one of several joint

[7] Bolton *v.* Gardner, 3 Paige, 273. Compare chapter L, paragraph 3 of this vol.

It has been held that the presumption was against a trustee's producing a release from his *cestui que trust* without explanation of how it came into his possession, and the fact that it was unattested, bore unexplained interlineations and expressed no consideration, was sufficient to warrant the court's refusal to sustain it, especially in the absence of positive proof that the *cestui* had signed and sealed it. Stewart's Estate, 140 Pa. St. 124, 21 Atl. Rep. 311.

[8] Gunther *v.* Lee, 45 Md. 60; Mooney *v.* City of Chicago, 239 Ill. 414, 88 N. E. Rep. 194. See 58 L. R. A. 293, notes.

If there be a satisfaction and an extinguishment of a cause of action *ex contractu* or *ex delicto* by an absolute or unconditional release executed to one of a number of persons jointly liable, the cause of action is released as to all; however, where it is agreed that one of the parties is not to be sued, the instrument is not a release and is construed as a covenant not to sue. Musolf *v.* Duluth Edison Electric Co., 108 Minn. 369, 122 N. W. Rep. 499, 24 L. R. A. N. S. 451.

[9] Nicholson *v.* Revill, 4 Ad. & E. 675.

A voluntary release by an obligee of one of several joint obligors operates to release all of them. Where the obligors, however, are severally as well as jointly liable, the effect of a release of one jointly liable is to discharge the others in so far as it is a joint obligation only, but it does not destroy the liability that is several, for there are as many obligations as there are several obligors. Krbel *v.* Krbel, 84 Neb. 160, 120 N. W. Rep. 935.

[10] Irvine *v.* Milbank, 15 Abb. Pr. N. S. 378, affi'g 14 Id. 408, s. c., 36 Super. Ct. (J. & S.) 264; Morgan *v.* Smith, 70 N. Y. 537, 543.

[11] N. Y. Debtor and Creditor Law, §§ 230–233.

Where a partnership is still in existence at the time the release of the partnership obligations is given to one partner, the other copartner is likewise released. Barber *v.* Davidson, 62 Misc. 552, 115 N. Y. Supp. 819.

debtors, may be given in evidence in bar of the creditor's action against the releasee, but without prejudice to his right to recover against the other debtors, and to their right of set-off. A release of one of several joint debtors, if not produced, will not be presumed to have been absolute, without proof.[12]

31. Oral Evidence.

Oral evidence is competent for the purpose of showing the obligations to which it applies; [13] but not to contradict its terms by excluding one to which they apparently apply.[14] An unsealed release may be supported by evidence that it was given on a sufficient consideration; and this may be shown by parol, though the writing be silent [15] or express a nominal or different consideration.[16] Parol evidence that plaintiff signed on conditions not expressed, is not competent for the purpose of exonerating him from its effect.[17]

[12] Boland *v.* Crosby, 49 N. Y. 183.

[13] Rowe *v.* Thompson, 15 Abb. Pr. 377; Strong *v.* Dean, 55 Barb. 337; Howlett *v.* Howlett, 56 Barb. 467.

[14] For instance, to show that a release of "all demands" was not intended to release a particular debt. Pierson *v.* Hooker, 3 Johns. 68.

Thus parol evidence has been held inadmissible to show that the claim in suit was not included among those embraced in a general release. Curro *v.* Altieri, 32 Misc. 690, 66 N. Y. Supp. 499.

[15] Frink *v.* Green, 5 Barb. 455.

Where it appeared that a creditor had released a claim which was in the hands of the debtor's assignee without expressing the consideration therefor, the court admitted parol testimony to show that the release was not given in cancellation of the claim but to enable the debtor to procure a dismissal of bankruptcy proceedings. Scott *v.* Scott, 105 Ind. 584, 5 N. E. Rep. 397.

[16] See chapter LI, paragraphs 5 and 12 of this vol.

Although on the face of a release it appeared that the defendant was discharged from liability for personal injuries on the payment of a sum of money only, the plaintiff was, nevertheless, allowed to show that part of the consideration for the release was an oral contract to employ him. Galvin *v.* Boston Elevated Railway Co., 180 Mass. 587, 62 N. E. Rep. 961.

[17] Van Bokkelen *v.* Taylor, 62 N. Y. 105, rev'g 2 Hun, 138, s. c., 4 Supm. Ct. (T. & C.) 422; Acker *v.* Phœnix, 4 Paige, 305;

32. Impeaching.

A sealed release [18] cannot be impeached for want of consideration.[19] The burden of proving fraud or mistake is on plaintiff if he rely on it to avoid his release.[20] Where the

and see chapter XXVII, paragraph 8 of this vol.

[18] As distinguished from a composition deed. Russell *v.* Rogers, 15 Wend. 351.

[19] Gray *v.* Barton, 55 N. Y. 68; Torry *v.* Black, 58 Id. 185. The New Jersey statutes concerning evidence (Gen. Stat., p. 413, § 72), permitting the consideration to be controverted in actions on unsealed instruments, does not apply to a release. Waln *v.* Waln, 58 N. J. L. 640, 34 Atl. Rep. 1068.

[20] Crossley *v.* The St. Louis, 4 Ben. 510; Schmidt *v.* Herforth, 5 Robt. 124.

Where a release is sought to be avoided because procured by false and fraudulent representations, a contention that the release is valid until cancelled in a suit in equity is not well taken, as the fraud sought to be proven goes to the question of whether the instrument ever had any legal existence as a release. De Lamar *v.* Herdeley, 167 Fed. Rep. 530, 93 C. C. A. 239.

"When the receipt is assailed upon the sole account of fraud and misrepresentation, it is necessary that the money received under the settlement should be tendered. If the person receiving the money asserts in an appropriate pleading that it was received by him for any other purpose than in settlement of his claim for damages, and that the receipt given was obtained by fraud or misrepresentation, a tender is not necessary, and if the plea is supported by sufficient evidence the question should be submitted to a jury." Bramble *v.* Cincinnati, Flemingsburg & South Eastern R. R. Co., 132 Ky. 547, 116 S. W. Rep. 742.

Where the plaintiff was injured in the employ of the defendant, and in consideration of the sum of $2 daily until the defendant's physician certified that he was able to resume work, agreed to release the defendant from all liability, it was held that the burden of proving the physician's certificate false and fraudulent rested upon the plaintiff. It was also held that evidence of the extent of the plaintiff's injuries and of his condition accompanied with the admonition to the jury that it was admitted only as bearing upon the issue as to whether or not the certificate was false or fraudulent, was properly admitted. Camden Interstate Ry. Co. *v.* Lester, 118 S. W. Rep. (Ky.) 268.

The judge correctly instructed the jury "that fraud is not mere misunderstanding, that it was not enough that a man should have signed one thing thinking it to be another, but that fraud is that circumvention, imposition and de-

release is unambiguous in its terms, oral evidence is inadadmissible to show that it was intended to embrace other matters not specified therein.[21]

But parol evidence is admissible for the purpose of proving that a release was signed without knowledge of its contents, and without any intention on the part of the signer to execute an instrument of that character.[22] A promise to

ceit, or getting around a man by words or acts fraudulent in their purpose, which operate as a deception upon his mind and entrap him; that a man is presumed to know the contents of what he signs; that fraud may be proved from acts and conduct as well as from declarations; and that deceit may take a negative form if it have the characteristics and effect of actual misrepresentation, and left it to the jury to say whether effectual fraud was practiced upon the plaintiff and whether he signed the papers under such circumstances that he was induced to sign them under a belief that they were simply releases for the money he received, instead of releases of the statute right of action." Larsson *v.* Metropolitan Stock Exch., 200 Mass. 367, 86 N. E. Rep. 940.

Where the issue is whether or not a release was fairly obtained, testimony tending to show the poverty and financial situation of the releasor, is competent. Treadway *v.* Union Buffalo Mills Co., 84 S. C. 41, 65 S. E. Rep. 934.

[21] Brady *v.* Read, 94 N. Y. 631.

So although the parties may have failed to express their intention, yet there the language of a release, with certainty and without ambiguity, releases one of several joint debtors, by operation of the law it releases all, and oral evidence is inadmissible to avoid this result. Clark *v.* Mallory, 185 Ill. 227, 56 N. E. Rep. 1099.

[22] Vaillancourt *v.* Grand Trunk Ry. Co., 82 Vt. 416, 74 Atl. Rep. 99; Lord *v.* American Mut. Acc. Ass'n, 89 Wis. 19, 46 Am. St. Rep. 815, 61 N. W. Rep. 293. The distinction in the rule as to the availability of parol evidence to contradict or modify the instrument, applicable to releases and that applied to receipts pointed out. Kirchner *v.* New Home Sewing Mach. Co., 135 N. Y. 182, 31 N. E. Rep. 1104.

"Evidence that plaintiff and the members of his family present at the time when the agent for the defendant secured his signature to this instrument of release, were unable to read the English language, was admissible under the issues; for, fraudulent representations on the part of the agent being pleaded as made for the purpose of securing such release, it was competent to show that plaintiff did not, in fact, know the contents of the instrument which he signed, and

pay the debt, in consideration of the release, cannot be proved.[23]

VII. SURETYSHIP AND MODIFICATION OF CONTRACT

33. Defendant a Surety.

Under the new procedure (as formerly in equity, and in some courts of law), oral evidence that defendant was a surety is admissible, in an action between the obligers in a written instrument, and equally against other parties to or holders of it, if they dealt with it with actual notice of the

that such contents were misrepresented to him by defendant's agent. Douda *v.* Chicago, &c. R. Co., 141 Iowa, 82, 119 N. W. Rep. 272.

Where in an action for damages on account of personal injuries, it appears that the defendant's claim agent called on the plaintiff, tendered her a small sum and took a receipt therefor, which in reality was a release from all liability, but had the paper so folded that all its contents could not be seen, and which the plaintiff honestly believed was a mere receipt, it was held that the fact that the plaintiff was in full possession of her senses and might have read the instrument, would go along way to establish that she had released her claim, but if she signed the release under the circumstances stated in her pleadings, then she should not be estopped to deny that she executed the instrument as a release. Roberts *v.* Colorado Springs & Interurban Ry., 45 Colo. 188, 101 Pac. Rep. 59.

Oral testimony as to the mental condition of the plaintiff at the time of signing a release, is competent to support a finding that he was of unsound mind but not entirely without understanding when he signed. Perkins *v.* Sunset Tel. & Tel. Co., 155 Cal. 712, 103 Pac. Rep. 190.

Where an agent of the defendant railroad company procured a release under circumstances amounting to fraud, it was held that as the defendant claimed the benefits of the acts of the person obtaining the release, it was therefore chargeable with all of his acts which were a part of the transaction. Piper *v.* Boston & Maine R. Co., 75 N. H. 228, 72 Atl. Rep. 1024.

[23] Stearns *v.* Tappin, 5 Duer, 294. As to new promise compare chapter LX, paragraph 38 of this vol., and Stearns *v.* Tappin (above).

A promise by a partner to pay a partnership debt is no consideration for the release of another partner whose obligation already exists. Ray *v.* Pollock, 56 Fla. 530, 47 So. 940.

fact of suretyship.[24] Actual notice to the creditor, of the fact of suretyship, at or before the time of the act complained of, must be shown; but for this purpose it is enough if the fact appear on the fact of the security.[25]

34. Modification.

An extension or modification of the contract may be proved by evidence which would be competent in favor of the principal.[26]

VIII. DISCHARGE

35. In Bankruptcy.

A discharge, even though granted pending the action,[27] is not admissible in evidence unless pleaded.[28] In case of a discharge under the Bankrupt Act of 1867, or the United

[24] Hubbard *v.* Gurney, 64 N. Y. 457; and cases cited in 11 Moak's Eng. R. 41, n. 183; 17 Id. 183; Artcher *v.* Douglass, 5 Den. 509; Garrett *v.* Ferguson, 9 Mo. 125, S. P., 1 Greenl. Ev., § 281, n. 2, and cases cited; Horne *v.* Bodwell, 5 Gray, 457.

[25] Gahn *v.* Niemcewicz, 11 Wend. 312, affi'g 3 Paige, 614.

Where the obligation did not on its face show that the defendant was a surety only, it was held that he might show that the creditor had knowledge of such relationship in order to enable him to avail himself of the defense of suretyship. Goodman *v.* Litaker, 84 N. C. 8, 37 Am. Rep. 602.

[26] In an action against a surety, while the burden of proving an extension is upon the defendant, it may, as in case of other agreements, be proved by circumstances, and the acts and conduct of the parties are admissible to interpret their language if that is, in any degree, doubtful or obscure. Powers *v.* Silberstein, 108 N. Y. 169, 15 N. E. Rep. 185.

[27] Rudge *v.* Rundle, 1 Supm. Ct. (T. & C.) 649; Bump on Bankr. (7th ed.) 748.

"A discharge in bankruptcy or insolvency, like payment or release, is a plea in bar which always goes to the merits or grounds of the action. The defense is one clearly recognized by the statute, and, when properly interposed, is effectual and conclusive." Tuttle *v.* Scott, 119 Cal. 586, 51 Pac. Rep. 849.

[28] Horner *v.* Spelman, 78 Ill. 206; Bump on Bankr. 748.

It is the discharge and not the adjudication in insolvency which discharges a debtor from provable debts, and hence a plea which simply sets up an adjudication is

States Revised Statutes, a general allegation that on a day named it was duly granted to the bankrupt (setting forth a copy) was enough to admit the evidence.[29] Defendant had the burden of proving his discharge.[30] The certificate was admissible without the record of proceedings:[31] and was conclusive evidence of the fact and regularity of the discharge.[32]

insufficient. White *v.* McCaughey, 20 R. I. 1, 36 Atl. Rep. 840, 37 Atl. Rep. 350.

Where the complaint sought to recover on a note, and the answer set up a discharge in bankruptcy, it was held that a reply containing new matter asserting fraud in obtaining the contract was inconsistent with the theory adopted in the complaint and was properly struck out. Strauch *v.* Flynn, 108 Minn. 313, 122 N. W. Rep. 320.

[29] U. S. R. S., § 5119; Hays *v.* Ford, 55 Ind. 52, N. Y. Code Civ. Pro., § 532.

Where a discharge is pleaded as a special plea, it must be shown affirmatively by allegations of fact that the discharge is valid, that it was granted by a court having jurisdiction upon due proceedings, and that it bars the claim in suit. Bradbury *v.* Tarbox, 95 Me. 519, 50 Atl. Rep. 710.

[30] Cooper *v.* Cooper, 9 N. J. Eq. (1 Stockt.) 566, 569.

[31] Morse *v.* Cloyes, 11 Barb. 100, 104, rev'g on other grounds in Seld. Notes, No. 5, p. 12, Bump on Bankr. 752.

So, also, it was held that the order confirming a composition in bankruptcy was admissible in evidence, and that it was sufficiently proved by producing a certified copy thereof under the seal of the clerk of the court. Mandell *v.* Levy, 47 Misc. (N. Y.) 147, 93 N. Y. Supp. 545.

[32] U. S. R. S., § 5120. See U. S. Comp. Stat., § 9598, etc.; Dusenbury *v.* Hoyt, 14 Abb. Pr. N. S. 132, s. c., 36 N. Y. Super. Ct. (J. & S.) 98, rev'd on another ground in 53 N. Y. 521; Stern *v.* Nussbaum, 5 Daly, 382, s. c., 47 How. Pr. 489. The presumption that the necessary final oath was taken is not overcome by the mere fact that it is not found on file. Young *v.* Ridenbaugh, 3 Dill. C. Ct. 239. The rules of pleading and evidence as to discharges under prior acts are more strict. See Morse *v.* Cloyes, 11 Barb. 100, rev'd on other grounds in Seld. Notes, No. 5, p. 12; and cases cited in Bump on Bankr. 749; and cases below cited; Schermerhorn *v.* Talman, 14 N. Y. 93; Sherwood *v.* Mitchell, 4 Den. 435. But even in respect to those charges, there is a legal presumption in favor of the regularity of the proceedings. McCormick *v.* Pickering, 4 N. Y. 276. See N. Y. Inst. for Instruction of Deaf & Dumb *v.* Crockett, 117 N. Y. App. Div. 269, 102 N. Y. Supp. 412.

Plaintiff has the burden of proving that his demand is one of a class excepted by the statute from the operation of the discharge, for example, that it is for money received in a fiduciary capacity.[33]

In case of a *foreign* bankruptcy, the burden is on defendant to show affirmatively that the contract or the parties to it were such that the foreign law could discharge the liability,[34] and that the requirements of the law were complied with.[35]

36. — Impeaching.

Unless a reply was required, the facts relied on to avoid a discharge may be proved in rebuttal, though not alleged.[36]

A discharge of the United States, under the act of 1867 or the Revised Statutes, cannot be impeached in a State court for any cause which would have prevented the granting of the discharge under the bankrupt act, or which would have been sufficient ground for annulling the discharge in the United States court under the act,[37] nor even on the ground that it was fraudulently obtained.[38] It is impeachable for entire want of jurisdiction.

[33] Sherwood *v.* Mitchell, 4 Den. 435; Harrison *v.* Lourie, 49 How. Pr. 124, 127. *Contra*, Clement *v.* Hayden, 4 Pa. St. 138. Or a claim for fraud or embezzlement, Bradbury *v.* Tarbox, 95 Me. 519, or false imprisonment, where both malice and want of probable cause are alleged and proved. Johnston *v.* Bruckheimer, 133 App. Div. 649, 118 N. Y. Supp. 189.

[34] Green *v.* Sarmiento, 3 Wash. C. Ct. 17, s. c., Pet. C. Ct. 74; and see Munroe *v.* Guilleaume, 3 Abb. Ct. App. Dec. 334.

[35] Fielmann *v.* Brunner, 2 Hun, 354, s. c., 4 Supm. Ct. (T. & C.) 556.

[36] Ruckman *v.* Cowell, 1 N. Y. 505, s. c., 7 N. Y. Leg. Obs. 7.

[37] Corey *v.* Ripley, 57 Maine, 69, s. c., 2 Am. Rep. 19.

A discharge in bankruptcy cannot be set aside in a state court while it remains in force under the federal courts. Turner *v.* Hudson, 105 Me. 476, 75 Atl. Rep. 45, 18 Ann. Cas. 600.

[38] Ocean National Bank *v.* Olcott, 46 N. Y. 12; Poillon *v.* Lawrence, 43 Super. Ct. (J. & S.) 385. *Contra*, Batchelder *v.* Low, 43 Vt. 662, s. c., 5 Am. Rep. 311. Compare Payne *v.* Able, 7 Bush, 344, s. c., 3 Am. Rep. 316; Hennessee *v.* Mills, 57 Tenn. 38.

A discharge in bankruptcy "must be attacked for fraud in the court of bankruptcy, if anywhere." Turner *v.* Hudson, 105 Me. 476,

37. Insolvency.

The discharge, even though granted pending the action, is not admissible unless pleaded.[39] A general allegation that it was duly given or made will admit it; [40] but if the allegation is put in issue, defendant must show jurisdiction.[41] The certificate of discharge, if it recite the jurisdictional facts, is admissible in evidence without the record of the proceedings; [42] and is *prima facie* sufficient [43] (though not conclusive)[44] evidence of jurisdictional facts. Its recitals are conclusive evidence of the existence and regularity of the non-jurisdictional matters recited.[45] Extrinsic evidence of regularity is competent.[46] Defendant is bound to show that the contract or parties to it were such that the State discharge could be operative upon it; [47] but it is for plaintiff to show that his debt was not provable.

75 Atl. Rep. 45, 18 Ann. Cas. 600.

[39] Cornell *v.* Dakin, 38 N. Y. 253; Spencer *v.* Beebe, 17 Wend. 557.

[40] N. Y. Code Civ. Pro., § 532.

[41] Id.

Facts showing jurisdiction of the parties and subject matter by the bankruptcy court, or allegations equivalent thereto must be pleaded. But under the New York Code, an allegation that the defendant was "duly adjudged" a bankrupt was held sufficient to prove these facts when controverted. Broadway Trust Co. *v.* Manheim, 47 Misc. 415, 95 N. Y. Supp. 93.

[42] O'Connell *v.* Sutherland, 16 Abb. Pr. 460, note.

[43] Barber *v.* Winslow, 12 Wend. 103, and cas. cit.; Jay *v.* Slack, 4 N. J. L. (1 South.) 77.

But where a creditor appears in the insolvency proceedings and accepts a dividend under the assignment, he will not be heard to impeach the discharge. Boston Nat. Bank *v.* Hammond, 21 Wash. 158, 57 Pac. Rep. 365.

[44] Morrow *v.* Freeman, 61 N. Y. 515.

[45] Stanton *v.* Ellis, 12 N. Y. 575. Or at least *prima facie*. Blanchard *v.* Young, 11 Cush. 341. As to effect of omission to file papers under the two-thirds act see Barnes *v.* Gill, 13 Abb. Pr. N. S. 169.

[46] Bullymore *v.* Cooper, 46 N. Y. 236, affi'g 2 Lans. 71. What presumptions arise from defects in the record, see Soule *v.* Chase, 1 Robt. 222, s. c., 1 Abb. Pr. N. S. 48, rev'd on another point, in 39 N. Y. 342; People ex rel. Pacific Mutual Ins. Co. *v.* Machado, 16 Abb. Pr. 460; Salters *v.* Tobias, 3 Paige, 338; Ayres *v.* Scribner, 17 Wend. 407.

[47] Smith *v.* Bennett, 17 Wend.

38. New Promise.

Plaintiff may prove in rebuttal, a new promise,[48] if made after discharge.[49] Acknowledgment or mere expression of intention is not enough.[50] The promise must be clear, dis-

479; s. p., Green *v.* Sarmiento, 3 Wash. C. Ct. 17, s. c., Pet. C. Ct. 74. For the mode of of proving domicil and citizenship, see Chapter V. For the effect of a state insolvent discharge, in respect to citizens affected, see Baldwin *v.* Hale, 1 Wall. 223, and cases there cited; Matter of Coates, 3 Abb. Ct. App. Dec. 231.

[48] Dusenbury *v.* Hoyt, 53 N. Y. 521, rev'g 36 Super. Ct. (J. & S.) 94, 14 Abb. Pr. N. S. 132. See Scheper *v.* Briggs, 28 App. Div. 115, 50 N. Y. Supp. 869.

The new promise may be oral. Lambert *v.* Schmalz, 118 Cal. 33.

"When the debt has been discharged by proceedings in insolvency, or has become barred by the statute of limitations, the remedy to enforce the payment of the debt is gone, but the moral obligation to pay it still remains and is a good consideration for a new promise to make such payment. (Chabot *v.* Tucker, 39 Cal. 434; McCormick *v.* Brown, 36 Cal. 180, 95 Am. Dec. 170.) And it is well settled that when an action is brought to recover such a debt it must be based upon the new promise, and to support the action it must appear that the promise was clear, distinct, unconditional, and unequivocal." Lambert *v.* Schmalz, 118 Cal. 33, 50 Pac. Rep. 13.

[49] Promise before discharge is irrelevant. Reed *v.* Frederich, 8 Gray, 230. The date of a written promise may be supplied by oral evidence. See Lobb *v.* Stanley, 5 Q. B. 574.

Since a certificate of discharge takes effect from the commencement of the proceedings in bankruptcy, a new promise to pay made after the commencement of such proceedings was held to be binding upon the bankrupt. Cheney *v.* Barge, 26 Ill. App. 182.

A new promise made prior to the bankrupt's discharge "did not constitute such a promise as would remove the bar of discharge," but when proved without objection, it was held that this promise might be considered as an intention to pay the debt in any event, "and as supporting the evidence of promises subsequently made." Lambert *v.* Schmalz, 118 Cal. 33, 50 Pac. Rep. 13.

[50] Allen & Co. *v.* Ferguson, 18 Wall. 1, citing Hill on Bankr. 264–6, and cases there collected.

There must be an actual promise before the debtor is bound, and an expression of intention to pay the debt is insufficient. Meech *v.* Lamon, 103 Ind. 515, 3 N. E. Rep. 159, 53 Am. Rep. 540; Lawrence *v.* Harrington, 122 N. Y. 408, 25 N. E. Rep. 406.

Similarly a simple acknowledgment that a debt still exists as

tinct and unequivocal.[51] If conditional, the occurrence of the condition must be shown.[52]

shown by statements in the bankrupt's letters admitting the moral obligation, was held insufficient to revive a debt discharged in bankruptcy. Mandell *v.* Levy, 47 Misc. 147, 93 N. Y. Supp. 545.

[51] Id., Stern *v.* Nussbaum, 5 Daly, 382, s. c., 47 How. Pr. 489. See also Lambert *v.* Schmalz, 118 Cal. 33, 35, 50 Pac. Rep. 13.

"It is a settled doctrine of this court, supported by adjudications of the courts of other jurisdictions, that after a debtor has been adjudged a bankrupt he may by a new promise to pay the original debt, if clear, distinct, and unequivocal, become liable therefor in an action at law. Torry *v.* Krauss, 149 Ala. 200, 202, 43 So. Rep. 184. See also Meech *v.* Lamon, 103 Ind. 515, 3 N. E. Rep. 159, 53 Am. Rep. 540; Griel & Bro. *v.* Solomon, 82 Ala. 85, 2 So. Rep. 322, 60 Am. Rep. 733.

[52] Allen *v.* Ferguson (above); Scouton *v.* Eislord, 7 Johns. 36; Eklar *v.* Galbraith, 16 Am. L. Reg. N. S. 78.

When a new promise to pay a debt discharged by bankruptcy is dependent upon a condition or contingency, the fact must be pleaded, and it must be proved that the condition has been performed, or that the contingency has happened. Griel *v.* Solomon, 82 Ala. 85, 2 So. Rep. 322, 60 Am. Rep. 733.

Where a debtor stated that when he received certain money then due him, he would pay the plaintiff's claim which had been barred by his debtor's discharge in bankruptcy, it was held that his failure to mention this condition when he later made several small payments, was conduct inconsistent with an intention to insist upon the condition, and that the jury were therefore authorized to find that the defendant had waived the condition. Tompkins *v.* Hazen, 30 App. Div. 359, 51 N. Y. Supp. 1003.

CHAPTER LXI

LIMITATIONS

1. Pleading.
2. Burden of proof.
3. New promise.
4. Conditional new promise.
5. Acknowledgment.
6. Part payment.
7. Indorsement of payments.

1. Pleading.

Even though plaintiff shows a case to which the statute appears to be a bar, the statute is not available to defendant unless he has pleaded the facts necessary to give it application.[53] If pleaded, the burden is on plaintiff to show any suspension of the statute on which he relies.[54]

[53] Gormley *v.* Bunyan, 138 U. S. 623; Brown *v.* Bell, 46 Colo. 163, 103 Pac. Rep. 380, 133 Am. St. Rep. 54, 23 L. R. A. N. S. 1096; Porter *v.* Armour, 241 Ill. 145, 89 N. E. Rep. 356; Alexander *v.* Munroe, 101 Pac. Rep. 903, 103 Pac. Rep. 514, 135 Am. St. Rep. 840; American Min. Co. *v.* Basin, etc., Min. Co., 39 Mont. 476, 104 Pac. Rep. 525, 24 L. R. A. N. S. 305; N. Y. Code Civ. Pro., § 413. The rule is satisfied by pleading the facts without mentioning the statute. Harpending *v.* Reformed Dutch Ch., 16 Pet. 455. This rule may be applied to special statutory limitations such as that of divorce. Kaiser *v.* Kaiser, 16 Hun, 602. Otherwise of delay, and staleness of claim in equity. Sullivan *v.* Portland, &c. R. R. Co., 94 U. S. (4 Otto) 806. Plaintiff may rely on the statutee though not pleaded, to bar any demand proved by defendant which did not call for a reply. Mann *v.* Palmer, 3 Abb. Ct. App. Dec. 162.

The statute of limitations is applicable both in equity and at law. See Holt *v.* Hopkins, 63 Misc. 537, 117 N. Y. Supp. 177.

The statute does not extinguish the debt but merely bars the remedy. Brown *v.* Bell, 46 Colo. 163, 103 Pac. Rep. 380, 133 Am. St. Rep. 54, 23 L. R. A. N. S. 1096.

In a statutory action of ejectment, the plaintiff has the burden of proving that the statute of limitations has not run and hence the defendant may prove the statute under a plea of "not guilty." A special plea of the statute in addition to a plea of not guilty will be stricken out as unnecessary. Vadebonceur *v.* Hannon, 159 Ala. 617, 49 So. Rep. 292.

[54] Baldwin *v.* Martin, 14 Abb. Pr. N. S. 9, s. c., 35 Super. Ct.

2. Burden of Proof.

Under a plea of the statute, the burden is on plaintiff to show the commencement of action within the statute period.[55] Under the new procedure, service, or the time of delivery to the sheriff for the purpose of service, is usually the time.[56] At common law the date of the process is *prima facie* evidence of the time when it was sued out,[57] but does not exclude

(J. & S.) 85, and cas. cit.; Graham *v.* Schmidt, 1 Sand. 74.

"The Statute of Limitations is to be employed as a shield and not as a sword; as a weapon of defense, not a weapon of attack." Cone *v.* Hyatt, 132 N. C. 810, 44 S. E. Rep. 678.

[55] 2 Greenl. Ev., § 431; Taylor *v.* Spears, 1 Eng. (6 Ark.) 381; House *v.* Arnold, 122 N. C. 220, 29 S. E. Rep. 334; Parker *v.* Harden, 121 N. C. 57, 28 S. E. Rep. 20; Leigh *v.* Evans, 64 Ark. 26, 41 S. W. Rep. 427. The burden of proving the bar by statute is upon the party pleading the statute. Thomas *v.* Glendinning, 13 Utah, 47, 44 Pac. Rep. 652; Stevens *v.* Rogers, 16 Utah, 105, 51 Pac. Rep. 261; Goodell *v.* Gibbons, 91 Va. 608, 22 S. E. Rep. 504. When a party has pleaded the statute of limitations as a defense to a promissory note, and such note is introduced in evidence by the opposing party, and it appears upon its face to be barred by the statute—the court taking judicial notice of when the action was commenced—the burden of proving such facts as will show the note is in fact barred devolves upon the party claiming under the note. Dielmann *v.* Citizen's Nat. Bank, 8 S. D. 263, 66 N. W. Rep. 311.

Or a subsequent promise or acknowledgment. Catholic Univ. *v.* Waggaman, 32 App. Cas. (D. C.) 307.

[56] N. Y. Code Civ. Pro., § 399.

An action is not begun until the summons is delivered to the sheriff. Smith *v.* Day, 39 Oregon 531, 64 Pac. Rep. 812, 65 Pac. Rep. 1055.

Service of a summons and complaint before the statute has run does not bar the defense of the statute where the complaint was not filed until after the statute had run. Cresswell *v.* Spokane County, 30 Wash. 620, 71 Pac. Rep. 195.

"When a plaintiff has filed his declaration and has done all that was incumbent on him to do towards the issue and service of process, and there has been failure of such issue or service, not through any act, intervention or omission on his part, he should not lose the benefit of his diligence, and the statute of limitations should not be permitted to intervene." Huysman *v.* Evening Star Newspaper Co., 12 App. Cas. (D. C.) 586.

[57] 2 Greenl. Ev., § 431.

Under the statute, it was held that the filing of the complaint

extrinsic evidence.[58] An indorsement by the deputy sheriff of its delivery at the office is not evidence of the date of its delivery, for the statute does not require him to make such indorsement.[59] It is not necessary to show that the process was actually returned, nor (at common law)[60] even that it was actually delivered to the sheriff; but it must be proved that it was sent to him, or his deputy, with an absolute and unconditional intention to have it served.[61] Oral declarations of trust, though incompetent evidence to establish the trust, are competent to show that at the time they were made the alleged trustee had not begun to claim adversely, and thus show that the statute had not then attached.[62]

The burden is on plaintiff to show the existence of facts which he relies on to create an exception from the general rule of the statute.[63] Where it is incumbent on plaintiff to

and the general appearance of the defendant by demurrer stopped the running of the statute, even though the summons was not served on the defendant until later. Keyser *v.* Pollock, 20 Utah, 371, 59 Pac. Rep. 87.

"The date of the filing of the petition is to be treated as the commencement of every suit when it is followed up by legal service." Cox *v.* Strickland, 120 Ga. 104, 47 S. E. Rep. 912, 1 Ann. Cas. 870.

[58] Id., Porter *v.* Kimball, 3 Lans. 330.

[59] Wardwell *v.* Patrick, 1 Bosw. 406. Compare N. Y. Code Civ. Pro., § 100.

[60] See N. Y. Code Civ. Pro., § 399.

[61] Burdick *v.* Green, 18 Johns. 14; Wood *v.* Mistretta, 20 Tex. Civ. App. 236, 49 S. W. Rep. 236, 50 S. W. Rep. 135.

A writ must be served, or a *bona fide* effort made to serve it, before it will stop the running of the statute of limitations; and the *bona fides* must be shown by proof that an effort was made to proceed according to law. Hence an attempt to serve process outside the jurisdiction of the court is not a *bona fide* effort which will stop the running of the statute. U. S. *v.* American Lumber Co., 85 Fed. Rep. 827, 29 C. C. A. 431.

[62] Barker *v.* White, 58 N. Y. 204.

It seems that in the case of an implied trust the statute will begin to run when such facts are brought to the attention of the *cestui* as will enable him to attempt enforcement of the trust. See Freeland *v.* Williamson, 220 Mo. 217, 119 S. W. Rep. 560.

[63] Ford *v.* Babcock, 7 N. Y. Leg. Obs. 270, s. c., 2 Sandf. 518; Somerville *v.* Hamilton, 4 Wheat. 230, 234. A plaintiff who relies upon a disability to save the bar

prove that he was under a disability, he must show that it was a continuing disability from the first.[64] Where fraud is available to suspend the running of the statute the presumption is, that if the party affected might with ordinary care and attention have seasonably detected it, he seasonably had actual knowledge of it.[65] The burden is on the debtor, whose absence has been shown and who relies on his return to the State, to prove the facts requisite to render his return effectual as the origin of the statute bar.[66]

3. New Promise.

A new promise is admissible in rebuttal though not alleged.[67] Otherwise of a promise varying the contract.[68] The evidence must show an express promise to pay, absolute or conditional, or an acknowledgment of the debt as subsisting, made under such circumstances that such a promise may be implied.[69] The promise must be made to

of the statute of limitations has the burden of proving its existence at the time the cause of action accrued, and that it was a continuing one until such date as will prevent the bar. Gross *v.* Disney, 95 Tenn. 592, 32 S. W. Rep. 632; Condon *v.* Enger, 113 Ala. 233, 21 So. Rep. 227.

A general denial puts in issue the facts alleged to remove the bar of the Statute. Good *v.* Ehrlich, 67 Kan. 94, 72 Pac. Rep. 545.

[64] Ang. on Lim. 204, § 196.

[65] Ang. on Lim., 193, § 187.

[66] Cole *v.* Jessup, 2 Barb. 309, 314; Ford *v.* Babcock, 7 N. Y. Leg. Obs. 270, 280, s. c., 2 Sandf. 518. If the contract was made without the State the burden is on defendant to show residence within it for the statute period. Mayer *v.* Friedman, 7 Hun, 218, affi'd 69 N. Y. 608.

[67] Esselstyn *v.* Weeks, 12 N. Y. 635, s. c., 2 Abb. Pr. 272; Dusenbury *v.* Hoyt, 53 N. Y. 521; Yaw *v.* Kerr, 47 Penn. St. 333.

[68] Lonsdale *v.* Brown, 3 Wash. 404.

[69] Wakeman *v.* Sherman, 9 N. Y. 85; Meyerhoff *v.* Froelich, 27 Weekly R. 258. If there was more than one debt, a general acknowledgment of indebtedness is not sufficient alone as evidence of a new promise to pay either one. Stafford *v.* Bryan, 3 Wend. 532, 536; and see 1 Pet. 351.

A mere acknowledgment of a debt, even if under oath, without an express or implied promise to pay, does not tell the statute. Nonotuck Silk Co. *v.* Pritzker, 143 Ill. App. 644.

There must be an actual affirmative intent on the part of the debtor to make a payment on the

the creditor, or some one acting for him, or if made to a third person must be calculated and intended to influence the action of the creditor.[70] Under the present statute an acknowledgment or new promise, relied on to take the case out of the limitation, must be in writing, signed by the party sought to be charged.[71] This statute does not alter the

obligation in order to warrant the inference of a new promise. Wanamaker *v.* Plank, 117 Ill. App. 327.

[70] Wakeman *v.* Sherman (above); Sibert *v.* Wilder, 16 Kan. 176, s. c., 22 Am. Rep. 280.

[71] N. Y. Code Civ. Pro., § 395; Esselstyn *v.* Weeks, 2 Abb. Pr. 272, s. c., 12 N. Y. 635; and see Adger *v.* Alston, 15 Wall. 555, 561. And an account stated, not signed, cannot be regarded as a new contract to sustain an action when action on the original indebtedness is barred by the statute. Chace *v.* Trafford, 116 Mass. 529, s. c., 17 Am. Rep. 171. The debtor's specifying the demand in an assignment for benefit of creditors may be enough as a new promise (Pickett *v.* King, 34 Barb. 193), but a part payment by his assignee does not revive the debt again as of the date of the payment. Roosevelt *v.* Mark, 6 Johns. Ch. 266. As to promises of joint debtors, partners after dissolution, &c., see p. 310 of this vol. and Beardsley *v.* Hall, 36 Conn. 270, s. c., 4 Am. Rep. 74. In those jurisdictions where the statute does not require a new promise to be in writing, *the statute of frauds* does not require it, if the original contract was in writing. Brandt on Suretyship & G. 85, § 65.

"Before the enactment of" § 395 "of the Code, and the similar statutes that preceded it, oral acknowledgments of the continued existence of a debt were sufficient to take a case out of the operation of the Statute of Limitations; the natural effect of that was to give rise to misconstruction of the words used by debtors in speaking of claims against them, and to multiply perjuries. And the reason for the enactment of the statute was to prevent perjuries, and to prevent the bar of the statute being raised, except when the debtor had given unequivocal evidence of the continued existence of the debt and of his intention to pay it. A writing signed by him would be such evidence." Bouton *v.* Hill, 4 App. Div. 251, 38 N. Y Supp. 498.

In Texas, under the Revised Statutes, article 3370, an acknowledgment of a claim made subsequent to the time it became due, is not admissible in evidence to take the case out of the operation of the statute unless such acknowledgment is signed by the party to be charged. San Antonio Real Est., etc., Assoc. *v.* Stewart, 94 Tex. 441, 61 S. W. Rep. 386, 86 Am. St. Rep. 864.

requisite acknowledgment or new promise, but only requires it to be in writing, signed;[72] and the date of the writing may be shown by oral evidence,[73] even for the purpose of correcting an erroneous date.[74] And oral evidence is competent to connect the new promise with the original debt.[75]

[72] Kincaid *v.* Archibald, 73 N. Y. 189, 192, affi'g 10 Hun, 9.

"While it is essential under the statute that a new promise to pay must be in writing, it is not necessary as contended by counsel for appellee, that the evidence of a payment should be in writing." Ott *v.* Flinspach, 143 Ill. App. 61.

[73] Edmonds *v.* Downs, 2 C. & M. 459.

In order to extend the time for bringing action a payment relied on must have been made by the party liable or his authorized agent. Knapp *v.* Crane, 14 App. Div. 120, 43 N. Y. Supp. 513.

The payment must be made by the debtor or some one authorized to make payment for him. Cone *v.* Hyatt, 132 N. C. 810, 44 S. E. Rep. 678.

[74] Kincaid *v.* Archibald, 73 N. Y. 189, 193, and cases cited.

A payment by direction of the party liable on a note will toll the statute. Walker *v.* Cassels, 70 S. C. 271, 49 S. E. Rep. 862.

"We are aware of no principle of law which makes the holder of collateral security placed in his hands coincident with the making of a note thereby secured an agent of the debtor with authority to bind him by a new promise to be implied from a payment of which the actual debtor is ignorant, having no knowledge as to when it is made or in what amount or that it is to be made at all by the security holder. Such holder of collateral security, if it be conceded that he possesses any authority as agent of the debtor, cannot in the absence of express warrant be presumed to have authority to make acknowledgment of a debt barred by the Statute of Limitations, nor to enter into a new contract springing out of and supported by the original consideration. The bare authority to make the payment does not necessarily imply authority to bind a principal by a new promise to pay. Nor does it matter whether the payment is made before or after the bar of the statute is complete. The rule is the same in either case." Wanamaker *v.* Plank, 117 Ill. A. 327.

[75] Ilsley *v.* Jewett, 2 Metc. 168, 173.

"Where a payment is made by an unauthorized person on account of another, and the latter afterwards assents thereto, he is bound by it, and it has the same effect as though made by himself." Clarkin *v.* Brown, 80 Minn. 361, 83 N. W. Rep. 351.

4. Conditional New Promise.

If the new promise was conditional, plaintiff must at least give evidence from which the jury may infer fulfillment of the condition, as expressed.[76] If the promise was to pay in

[76] Cartledge *v.* West, 2 Den. 377; Wakeman *v.* Sherman, 9 N. Y. 85; Bush *v.* Barnard, 8 Johns. 407.

"In the Littlefield case (91 N. Y. 203) one of three makers of a joint and several promissory note, who in fact signed it as surety, upon being applied to for payment, requested the payee to tell the principal that he must make a payment thereon and that he (the surety) said so. The payee made the statement to the principal as requested, who promised to and did subsequently make a payment; this he reported to the surety, who in response stated that it was all right. In an action upon the note it was held that these facts did not show an authority conferred upon the principal to make payment as the agent of the surety so as to take the case, as to the latter, out of the Statute of Limitations." Smith *v.* Carpenter, 48 App. Div. 350, 63 N. Y. Supp. 47.

"Where the personal representative of a deceased person has unquestioned authority from his decedent to make payment upon an indebtedness, his acts therein will bind those whom he represents to the extent of creating a new promise and bringing an indebtedness otherwise barred from out the Statute of Limitations." Ott *v.* Flinspach, 143 Ill. App. 61.

"In the case of a new promise, made while the original obligation is legally enforceable, if that promise be not a general promise to pay the obligation according to its tenor and terms, but is a promise coupled with any condition, and an action is brought after the statute of limitations would have barred the remedy upon the original obligation, the action of plaintiff is then on the substituted, conditional promise, and not upon the original obligation. Such substituted, conditional promise must be pleaded, breach of it averred, and the recovery had after such showing." Morehouse *v.* Morehouse, 140 Cal. 88, 73 Pac. Rep. 738, quoting from Rodgers *v.* Byers, 127 Cal. 528, 60 Pac. Rep. 42.

There is a distinction to be drawn between an absolute promise to pay an existing obligation and a conditional promise so to pay. The latter does not toll the statute of limitations. Thisler *v.* Stephenson, 54 Wash. 605, 103 Pac. Rep. 987.

"No set form of words is required to constitute an acknowledgment of the debt. Such acknowledgment may be inferred even from facts or acts, without words of express acknowledgment, as from part payment of the claim, or other clear and definite recognition of the present existence of the debt in suit." Catholic Univ.

specific articles, plaintiff must show that he was ready and offered to accept them. Promise to pay when able, is insufficient without evidence of the ability to pay.[77] Direct evidence of ability is not necessary; it may be inferred from circumstances.[78] To show continuing inability, defendant may prove his indebtedness to third persons without producing or accounting for written securities.[79]

5. Acknowledgment.

Evidence of an acknowledgment is not enough unless it suffices to sustain an inference of promise;[80] but an acknowledgment without words importing intent to pay may suffice.[81] The production of the instrument sued on, with an indorsement in the handwriting of the debtor, of his name and the date of the indorsement, is a sufficient acknowledgment in a writing signed by the party chargeable, within the meaning of the statute.[82]

6. Part Payment.

The statute requiring a new promise to be in writing does not prescribe any new rule of evidence as to the fact or effect of payment; and part payment may be proved by oral admissions of the debtor.[83] Where a part payment relied on was made by an agent, the evidence must sustain an inference that the agent had authority to make a new promise, or to perform for the party the very act which is relied on as

v. Waggaman, 32 App. Cas. (D. C.) 307, quoting from Bean *v.* Wheatley, 13 App. Cas. (D. C.) 473.

[77] Id., Tompkins *v.* Brown, 1 Den. 247; Chandler *v.* Glover, 32 Pa. St. 509.

[78] Thus the fact that he was in business and kept open store is enough to go to the jury. Lonsdale *v.* Brown, 4 Wash. C. Ct. 86. The mere fact of his having a sign of business over his door is not enough. Everson *v.* Carpenter, 17 Wend. 419, 422.

[79] Duffie *v.* Phillips, 31 Ala. 571.

[80] Van Keuren *v.* Parmlee, 2 N. Y. 523.

[81] Cowan *v.* Magauran, Wall., Jr., 66 and cas. cit.

[82] Bourdin *v.* Greenwood, L. R. 13 Eq. Cas. 281, s. c., 1 Moak's Eng. 677.

[83] First National Bank of Utica *v.* Ballou, 49 N. Y. 155, 2 Lans. 120.

evidence of a new promise.[84] The authority of the agent may be proved by parol.[85] If defendant or his authorized agent made the payment, it is immaterial whose money was used.[86]

The part payment must be an actual transfer of something of value, not a mere indorsement or deduction;[87] and it must be shown to have been made under circumstances which will warrant a finding, as a question of fact, that the debtor intended to recognize the debt as subsisting, and that he was willing to pay it;[88] but its effect is not impaired by

[84] Smith *v.* Ryan, 66 N. Y. 352, 356, aff'g 39 Super. Ct. (J. & S.) 489.

[85] First Nat. Bank of Utica *v.* Ballou, 49 N. Y. 155.

[86] Id.

The decisions as to what is a sufficient acknowledgment of a debt, to take it out of the statute are very numerous and not altogether harmonious. It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it. But oral evidence may be resorted to, as in other cases of written instruments, in aid of the interpretation. Consistently with this rule, it has been held that oral evidence is admissible to identify the debt and its amount, or to fix the date of the writing relied upon as an acknowledgment, when these circumstances are omitted. Manchester *v.* Breadner, 107 N. Y. 346, 349, 14 N. E. Rep. 405; Kincaid *v.* Archibald, 73 N. Y. 189; Lechmere *v.* Fletcher, 3 Tyrw. 450; Bird *v.* Gammon, 3 Bing. (N. C.) 883.

[87] Blanchard *v.* Blanchard, 122 Mass. 558, s. c., 23 Am. Rep. 397.

[88] Pickett *v.* King, 34 Barb. 193. Hence compulsory payment is not enough. Morgan *v.* Rowlands, L. R. 7 Q. B. 493, s. c., 2 Moak's Eng. 611, and cas. cit. In application of the same principle, the delivery of a bill or note of a third person as collateral security or as provisional or conditional part payment, is competent evidence within the rule allowing evidence of payment, and whether the security resulted in payment part or not is immaterial. Smith *v.* Ryan, 66 N. Y. 352, 355, affi'g 39 Super. Ct. (J. & S.) 489. But on the other hand, a part payment derived from a collateral security without the assent of the debtor to it as a payment, is not alone sufficient as a new promise. Harper *v.* Fairley, 53 N. Y. 442.

"The efficacy of a payment to avert the effect of the statute as a bar resides in the conscious and voluntary act of the debtor, explainable only as a recognition and confession of the existing

evidence that he supposed the part payment would extinguish the whole.[89]

Evidence of mere payment of money is not enough without something to connect it with the debt in suit.[90]

The effect of a part payment, as against the statute, may be repelled by evidence that the debtor, at the time of making it, expressly disputed the balance or the item now contested.[91]

7. Indorsement of Payment.

An indorsement on the instrument sued on, acknowledging a part payment, and dated, is competent, and sufficient to go to the jury, if in the handwriting of the defendant; or, when in the handwriting of the creditor who is shown to have since deceased,[92] if there is extrinsic evidence of the

liability." Bouton *v.* Hill, 4 App. Div. 251, 38 N. Y. Supp. 498.

[89] Carrington *v.* Crocker, 37 N. Y. 336, s. c., 4 Abb. Pr. N. S. 335.

[90] Livermore *v.* Rand, 26 N. H. (6 Fost.) 85.

[91] Peck *v.* N. Y. and Liverpool S. S. Co., 5 Bosw. 226, 237.

"The Statute of Limitations is a statute of repose. It suspends the remedy, but does not cancel the debt." Cone *v.* Hyatt, 132 N. C. 810, 44 S. E. Rep. 678.

[92] Risley *v.* Wightman, 13 Hun, 163, 165, 1 Greenl. Ev. 13th ed. 155. Where payments on a note, or of interest thereon, are all indorsed in the plaintiff's handwriting when the maker was not present, it devolves upon the latter, relying on such payments to avoid the bar of the statute, to show that they were made by the maker or some one as attorney for him. Waughop *v.* Bartlett, 165 Ill. 124, 46 N. E. Rep. 197.

"'But is the indorsement alone evidence that the payment was made at the times stated in the indorsement?' We think not." Schlotfeldt *v.* Bull, 18 Wash. 64, 50 Pac. Rep. 590.

Where the payment was made before the statute had run but was not indorsed on the note until after, it was nevertheless sufficient to toll the statute. Hastie *v.* Burrage, 69 Kan. 560, 77 Pac. Rep. 268.

The husband of a deceased payee of a note as one of the heirs entitled to share in his wife's estate is "not a stranger to the note, although not the legal representative of the decedent, and . . . his indorsement of the payments of interest, if such payments were actually made at the times at which they purported to have been made by the indorsements upon the note," will bind the payor and "toll the running of the Statute."

date.[93] In other cases an indorsement on the security, made by the creditor without the privity of the debtor, is not evidence of the payment for this purpose, unless it appear that it was made at a time when its operation would be against the interest of the person making it.[94] With such evidence it is sufficient to go to the jury.[95]

Peters *v.* Rothermel, 30 Pa. Super. Ct. 281.

[93] Decker *v.* Zeluff, 23 App. Div. 107, 48 N. Y. Supp. 385. Whether this is necessary compare Risley *v.* Wightman (above); Knight *v.* Clements (above); 1 Greenl. Ev. 154, §§ 121, 122; Miller *v.* Dawson, 26 Iowa, 186.

"Indorsements made upon promissory notes are presumed to have been made at the time such indorsements bear date." McElvain *v.* Garrett, 84 Mo. App. 300.

"Where an indorsement of payment on a promissory note made before the bar of the Statute attaches, is relied on to rescue the note from the bar of the Statute of Limitations, it must be shown that the payment was made at the time it purports to have been, or that it was made by or with the consent of the payor." Gardner *v.* Early, 78 Mo. App. 346. "It is not necessary to prove both that the indorsements were made when they purport to have been made, and that the payments evidenced by the indorsements were actually made by the defendants or one of them; the proof of either one of the other of these facts was sufficient to take the cause out of the bar of the Statute." Gardner *v.* Early, 78 Mo. App. 346.

[94] It is the fact, and that alone, that it was against the interest of the holder to make such indorsements that makes them *prima facie* evidence of payments. Roseboom *v.* Billington, 17 Johns. 182; Risley *v.* Wightman, 13 Hun, 163; Hulbert *v.* Nichol, 20 Hun, 454; In re Kellogg, 104 N. Y. 648, 651, 10 N. E. Rep. 152. And so, at least, that it was made before the statute could have operated. Mills *v.* Davis, 113 N. Y. 243, 21 N. E. Rep. 68; Young *v.* Alford, 118 N. C. 215, 23 S. E. Rep. 973.

"A credit entered by the payee or at his direction during the life of the note (that is before the stat-

[95] Roseboom *v.* Billington, 17 Johns. 182. The provision of the New York Code of Civil Procedure (§ 395), declaring that, in order to take a case out of the statute of limitations, that an acknowledgment or promise to pay in writing, signed by the party to be charged, is necessary; but that this "does not alter the effect of a payment of principal or interest" does not change the nature or effect of a part payment. The old rule is recognized and continued, and the payment may be proved by oral evidence. Mills *v.* Davis, 113 N. Y. 243, 21 N. E. Rep. 68.

ute had run) makes a *prima facie* case of payment. But in order to have this effect it must be shown that the credit was entered before the note was barred for at that time such entry was against the interest of the payee but not so when indorsed after the statute had run." Briscoe *v.* Huff, 75 Mo. App. 288.

"When an indorsement of a credit on a note is relied on to take the case out of the operation of the Statute of Limitations, the plaintiff must, to establish a *prima facie* case, prove either that the credit was indorsed on such note at a time when it was against his interest to make it, or, that it was made with the consent of the payor; but a mere indorsement by the holder himself without the knowledge or consent of the payor, or other proof that the payment was then made, is insufficient if the note would be barred by the Statute but for the credit." McElvain *v.* Garrett, 84 Mo. App. 300.

Where the indorsement is made by the payee there must be other evidence than the indorsement itself to show that payment was made on the date indicated. Briscoe *v.* Huff, 75 Mo. App. 288.

"The indorsement, having been made after the note had outlawed, and at a time when, if true, it would inure to the benefit of the claim, is not competent evidence to show such alleged payment unless the indorsement was in the handwriting of the testator, or shown to have been made with the privity of the said testator." Matter of Salisbury, 41 Misc. 274, 84 N. Y. Supp. 215.

"The indorsement of a payment upon a note in the handwriting of the payee thereof is incompetent as evidence of payment, to stop the running of the Statute of Limitations. After a note is barred by the Statute, the indorsement of a payment thereon by the payee is in his own interest, because it keeps the debt alive. Declarations by the party in his own favor can never be admitted in evidence. If the payee's declaration that he had received a partial payment is inadmissible as evidence, equally so is his written acknowledgment of such payment." Wellman *v.* Miner, 179 Ill. 326, 53 N. E. Rep. 609.

CHAPTER LXII

FORMER ADJUDICATION

1. General Rules.
2. Former recovery as merging the cause of action.
3. Splitting cause of action.
4. Former adjudication as an estoppel.
5. What questions are concluded.
6. Construction of instrument.
7. Courts and tribunals.
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1. General Rules.

The general rules are: 1. The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or, as evidence, conclusive between the same parties, on the same matter directly in question in another court; 2. The judgment of a court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another court for another purpose; 3. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment.[96]

[96] Duchess of Kingston's Case, 20 How. St. Tr. 538, s. c., 2 Smith's L. Cas. 609; Caujolle *v.* Ferrie, 13 Wall. 465, 469. The conclusive effect is lost if opportunity to plead has been had and neglected. Chapter LXII, paragraph 4, note 5. The reader will be assisted in harmonizing the otherwise irreconcilable conflict which apparently exists, even among well considered decisions, if he bears in mind the distinction between the following important classes of cases, which are all comprehended under the general designation of "former adjudication." 1. Where, to prevent plaintiff from maintaining

2. Former Recovery as Merging the Cause of Action.

A former recovery in favor of plaintiff, relied on, not as furnishing evidence in support of defendant's present al-

any action, defendant insists that he has already had his action on the same cause and it has been determined against him. Here the judgment is a bar. 2. Where defendant adduces a judgment between himself and plaintiff, as evidence of the truth of defendant's allegation of fact or denial. Here if the action was for the same cause, the judgment is conclusive on every question that might have been litigated; if on another claim or demand, it is conclusive as to those questions which actually were litigated and determined. 3. Where he adduces it as determining the construction of a contract between them, or of a statute on which their controversy turns. 4. Where, to prevent plaintiff from maintaining any action, defendant insists that he has already had his action and recovered judgment on facts now alleged. Here, although the judgment may be evidence of the truth of the allegations of the complaint, it merges the cause of action, and though the allegations be true the court will not give plaintiff a second judgment. See, for the limits of this rule, 4 Abb. N. Y. Dig. new ed. 36; 3 Id. 452–74, 1 Id. 268. 5. Where he alleges that plaintiff has sued for and recovered a part of an entire claim which cannot be split. Here the court, upon the same principle, will not entertain a second action, although it be clear that something remained due and unrecovered, which ought to have been recovered in the first action. See 1 Id. 627; Jex *v.* Jacob, 7 Abb. New Cas. 453; Perry *v.* Dickenson, Id. 466. 6. Where he alleges that in a former action by himself against the plaintiff, the latter ought to have set off what he now alleges, and by failing to do so is concluded. See Blair *v.* Bartlett, 75 N. Y. 150. Independent of the rules stated in the text, judicial proceedings may be given in evidence, like anything else, as circumstances from which to infer a given consequence, without that concurrence as to identity of parties and subject-matter which works a technical bar. Van Rensselaer *v.* Akin, 22 Wend. 549. The pleading of a party in a former proceeding is competent against him (without reference to identity of subject or parties), if shown to have been made with this knowledge or sanction. Cook *v.* Barr, 44 N. Y. 156. But is not conclusive unless there is some ground for treating it as raising an estoppel. Id. When used for other objects than as a bar or estoppel, as for instance in deraigning a title or to show a confession, or an act done, the reason of the rule restricting the evidence to a case between the same parties ceases. A mere stranger to a verdict and judgment for instance, who claims land in virtue of a

legations, but as merging the cause of action and constituting a bar to a new action, is not admissible if not pleaded.[97]

purchase upon execution, may give the record in evidence. A plea of guilty to an indictment for an assault and battery may be received as evidence against the defendant in a civil action at the suit of the prosecutor; an answer in chancery in one suit is admissible in another between different parties. Walsh *v.* Ostrander, 22 Wend. 177, COWEN, J.; Barr *v.* Gratz, 4 Wheat. 213. And, where reputation is relevant, a judgment between different parties establishing the fact is competent evidence of reputation. Reed *v.* Jackson, 1 East, 355. Where pleadings and a judgment or decree are put in evidence for such a purpose to prove a fact which appears on the face of those documents to have been in issue, the party producing them is not bound also to put in the depositions as part of his own case. Laybourn *v.* Crisp, 4 M. & W. 320, Rosc. N. P. 128. The fact that the decision in the former action as to the matter in question was based on another ground than that urged in the second action, will not prevent the former judgment from being a bar. Wildman *v.* Wildman, 70 Conn. 700, 41 A. 1. If the new suit merely presents new grounds for relief upon the same cause of action, it is barred by the former suit, as where the plaintiff brings an action for injuries resulting from the negligence of the defendant in carelessly and suddenly closing the gates and starting the car while the plaintiff was in the act of alighting, and is defeated, and subsequently brings another action against the same defendant for the same injuries, charging that the car was provided with a defective step. McKnight *v.* Minneapolis St. R. Co., 127 Minn. 207, 149 N. W. Rep. 131, L. R. A. 1916, D. 1164.

[97] Bryson *v.* St. Helen, 79 Hun, 167, 29 N. Y. Supp. 524; Willis *v.* McKinnon, 37 Misc. 386, 75 N. Y. Supp. 770; Lambert *v.* Rice, 143 Iowa, 70, 120 N. W. Rep. 96; Norris *v.* Amos, 15 Ind. 365. Otherwise at common law. Mason *v.* Eldred, 6 Wall. 231, 234. Nor is it available when not pleaded by defendant, even if proved by plaintiff. Brazill *v.* Isham, 12 N. Y. 9, affi'g 1 E. D. Smith, 437. But admission without objection is not ground of reversal. N. Y. Cent. Ins. Co. *v.* Nat. Prot. Ins. Co., 14 N. Y. 85; Draper *v.* Stouvenel, 38 Id. 219, 222. The defense of estoppel and *res adjudicata* may be presented on demurrer, where the existence of such defense clearly appears upon the face of the complaint. Hewitt *v.* Great Western Beet Sugar Co., 230 Fed. Rep. 394, 144 C. C. A. 536. An answer "that the facts set forth in the complaint in this action are the same facts alleged in the complaint in the former action, in which there was a judgment on the merits dismissing the action sufficiently sets up the estoppel." Whitcomb *v.*

3. Splitting Cause of Action.

A judgment in a former action brought only for a part of the same cause of action, is admissible (if pleaded) to bar recovery for the residue; and all the items of a running account constitute a single cause of action within this rule,[98-99]

Hardy, 68 Minn. 265, 71 N. W. Rep. 263. "The answer of former adjudication is not founded on the pleadings in the former suit, and it is not necessary, therefore, to file with such answer a copy thereof as an exhibit." McCarty *v.* Kinsey, 154 Ind. 447, 57 N. E. Rep. 108.

[98-99] Secor *v.* Sturgis, 16 N. Y. 548. "'If a contract be entire, but one suit can be maintained for a breach thereof.'" Atlanta El. Co. *v.* Fulton Bag, etc., Mills, 106 Ga. 427, 32 S. E. Rep. 541; Peacock *v.* Coltrane (Tex. Civ. A.), 116 S. W. Rep. 389. See also Watkins *v.* American Nat. Bank, 134 Fed. Rep. 36, 67 C. C. A. 110. An action to recover damages for part breaches of a divisible installment contract will not bar a subsequent action for future breaches where there is nothing in the record of the first action to show that the plaintiff accepted a renunciation of the contract. Canada Atlantic, etc., S. S. Co. *v.* Flanders, 165 Fed. Rep. 321, 91 C. C. A. 307. "One action only lies to redress a single wrong, or, as frequently expressed, a single tort gives rise to a single cause of action, and a plaintiff cannot be permitted to indulge in unnecessary litigation by splitting up a cause of action and prosecuting more than one suit thereon." Liumatainen *v.* St. Louis River Dam, etc., Co., 119 Minn. 238, 137 N. W. Rep. 1099. "If, by an action or defense" one "avails himself of a part of a single claim or obligation, he thereby estops himself from enforcing the remainder of it." Brown *v.* Newton First Nat. Bank, 132 Fed. Rep. 450, 66 C. C. A. 293. In an action against the guarantor of a promissory note, a claim for attorney's fees in connection with the recovery on said note can be enforced only in the action on the guaranty and the plaintiff's failure to set it up in that action bars him from bringing a separate action. Abbott *v.* Brown, 131 Ill. 108, 22 N. E. Rep. 813. Where the action is for the recovery of certain stock, withheld by the assignee of a brokerage firm, and the plaintiff is granted possession thereof on payment of a certain amount due from him to the firm, he cannot subsequently bring another action against the assignee for damages sustained by reason of fluctuation in the market during the detention of the stock. Harding *v.* Gaillard, 95 Misc. 377, 158 N. Y. Supp. 920. Where a party is entitled to both legal and equitable relief upon the same cause of action, he cannot maintain separate actions therefor, the old common law distinction between ac-

tions at law and suits in equity having been abolished under the modern code of civil procedure. Hahl *v.* Sugo, 169 N. Y. 109, 62 N. E. Rep. 135, 88 Am. St. Rep. 539, 61 L. R. A. 226, N. Y. Code Civ. Pro., § 3339. "A defendant who has a claim against the plaintiff which is available, at his option, either as a defense or as an affirmative cause of action, estops himself from maintaining an action to recover any part of it, and loses the excess by interposing it as a defense and applying a part of it to pay or defeat the plaintiff's action." Brown *v.* Newton First Nat. Bank, 132 Fed. Rep. 450, 66 C. C. A. 293. A judgment in an action by a dismissed employee to recover one month's salary is a bar to a subsequent action to recover salary for the remaining months of his contract. Eisenhower *v.* Centralia School Dist., 13 Pa. Super. Ct. 51. When an officer brings an action of quo warranto but makes no claim for loss of fees and emoluments, he cannot later bring an action for such fees and emoluments as by his failure to insist on their recovery in the former action he has waived his rights. McCall *v.* Webb, 135 N. C. 356, 47 S. E. Rep. 802. A judgment enforcing the individual liability of the stockhholders of a corporation is not a bar to a subsequent action by the same creditor to enforce such liability on another claim which he holds as his demand is not single or indivisible. Manley *v.* Park, 68 Kan. 400, 75 Pac. Rep. 557, 66 L. R. A. 967, 1 Ann. Cas. 832. Where the receiver of an insolvent national bank brings an action under the direction of the comptroller to enforce the stockholders' liability to an extent less than the full amount of their obligation, this action is a bar to a subsequent action to enforce the balance of their liability as the cause of action is indivisible. De Weese *v.* Smith, 97 Fed. Rep. 309. In an action for damages for breach of a contract of employment in that the employer refused to permit the employee to perform his services for the months of November and December, proof of a recovery in a prior action of the salary due for October on the same theory was held a bar. Rauh *v.* Wolf, 62 Misc. Rep. 621, 116 N. Y. Supp. 13. A judgment for damages sustained by reason of the improper performance of work and labor does not bar a subsequent action to recover for doing such work and labor as the one action sounds in tort and the other in contract. Mimnaugh *v.* Partlin, 67 Mich. 391, 34 N. W. Rep. 717. One who has been unlawfully imprisoned and has had judgment in *assumpsit* in an action to recover moneys paid to secure his release cannot subsequently sue in trespass to recover for other injuries occasioned by the same unlawful imprisonment. Foss *v.* Whitehouse, 94 Me. 491, 48 Atl. Rep. 109. Where the injury to abutting property arising " from the construction of a railroad is permanent and enduring a single recovery must be had for all the

and so do all sums due on a single covenant, at the time of commencement of action.[1]

damages alleged to result from it if properly operated." Covington, etc., R. Co. *v.* Kleymeier, 105 Ky. 609, 49 S. W. Rep. 484. An action for the creation of a nuisance is not a bar to a subsequent action between the same parties, for its continuance. Chicago, etc., R. Co. *v.* Schaffer, 124 Ill. 112, 16 N. E. Rep. 239. But where the value of the property effected by a railroad structure is not thereby destroyed "or the nuisance complained of is not, from its very nature, permanent, then successive actions may be brought for the injuries as they occur." International, etc., R. Co. *v.* Slusher (Tex. Civ. A.), 115 S. W. Rep. 673. Where a person sustains injuries both to himself and his property by the same tortious act, the recovery of judgment for the injury to the property will bar a subsequent action for the injuries to his person. Kimball *v.* Louisville, etc., R. Co., 94 Miss. 396, 48 So. Rep. 230. An action by a seaman against his ship to recover on the ground of negligence for injuries sustained on a voyage is not a bar to a subsequent action for wages earned on the same voyage although the two causes of action could have been joined in one suit. Olsen *v.* Whitney, 109 Fed. Rep. 80.

[1] Jex *v.* Jacob, 7 Abb. New Cas. 453. The true distinction seems to be that if the claims constituted a single cause of action, though arising on different transactions or periods,—as, for instance, a running account, or successive instalments of rent actually accrued,—a judgment for part bars a new action for the rest; but if they are such that although they might have been joined, they must have been separately stated as separate causes of action, even though they arose at the same time or on the same contract,—such as claims on distinct covenants, or claims on a principal and on a collateral security, etc., —a judgment on one does not bar a new action on the other, unless by establishing some matter fatal to both. Compare Jex *v.* Jacob, 7 Abb. New Cas. 453; and Perry *v.* Dickenson, Id. 466, and cases cited, where conflicting cases are collected. The fact that a plaintiff in his pleading specifically reserves the right to sue for the balance of his claim not included in that suit does not increase his rights on a plea of *res adjudicata* to a subsequent suit for such balance. Atlanta El. Co. *v.* Fulton Bag, etc., Mills, 106 Ga. 427, 32 S. E. Rep. 541. It appears that where a note is secured by a lien, suit may be brought and recovery had thereon, and if in such suit no foreclosure on the lien is sought, a second suit may be brought to foreclose the lien. Houston *v.* Walsh, 27 Tex. Civ. App. 121, 66 S. W. Rep. 106. See also Kempner *v.* Comer, 73 Texas, 196, 11 S. W. Rep. 194; McAlpin

4. Former Adjudication as an Estoppel.

Where a former adjudication is pleaded [2] as an estoppel, it is a conclusive bar.[3] Where the party could and did not

v. Burnett, 19 Tex. 497; Ball *v.* Hill, 48 Texas, 634; Aransas Lumber Co. *v.* Hynes (Tex. Civ. A.), 38 S. W. Rep. 372.

[2] It must be averred and proved that the former judgment was final. Railroad *v.* Brigman, 95 Tenn. 624, 32 S. W. Rep. 762. A former recovery may be shown in evidence, under a plea of general issue, as well as pleaded in bar. When successfully pleaded, it is conclusive upon the parties. If the evidence offered, under a plea of the general issue, to support the contention of *res adjudicata*, shows that the same subject-matter has already been adjudicated and adjudicated between the parties by the former judgment of a court of competent jurisdiction, it is as conclusive a bar to any further recovery as though it had been urged by special pleas in bar. Little *v.* Barlow, 37 Fla. 232, 20 So. Rep. 240; Foulke *v.* Thalmessinger, 1 App. Div. 598, 601. A judgment in an action for assault and battery and slanderous words used by the defendant during a quarrel is not a bar to a subsequent action for slander where the court in which the first action was brought did not have jurisdiction over an action for slander. McCarty *v.* Kinsey, 154 Ind. 447, 57 N. E. Rep. 108.

[3] The burden of proof is upon the party claiming an estoppel by a former judgment, to show clearly that the fact in issue was determined in the former action. Zoeller *v.* Riley, 100 N. Y. 102, 2 N. E. Rep. 388. The complete record in the former suit, including the judgment therein, should be produced, and not incomplete or detached portions thereof. Little *v.* Barlow, 37 Fla. 232, 20 So. Rep. 240. A judgment in a mandamus proceeding that a defendant gas company wrongfully refused to supply the relator with gas is *res adjudicata* as to that fact in a subsequent action for the recovery of damages based on the same wrongful acts. Greenfield Gas Co. *v.* Trees, 165 Ind. 209, 75 N. E. Rep. 2. A judgment in an orphans' court dismissing a petition to compel an executor to account, the object of such accounting being to produce a fund out of which a legacy could be paid is a bar to a subsequent suit in a court of concurrent jurisdiction to recover the legacy under the provisions of the state law. Wilson *v.* Smith, 117 Fed. Rep. 707. "A judgment in ejectment pure and simple is not a bar to another action in ejectment for the same land between the same parties." Stone *v.* Perkins, 217 Mo. 586, 117 S. W. Rep. 717. The fact that a plaintiff may have previously instituted an action against a railroad for negligently suffering its stock pens to become filthy to such an extent as to interfere with the

plead it, but denied the fact to conclude which it is offered, he consents to try the fact, and the adjudication is only *prima facie* evidence. Where from the form of the proceeding he could not plead it, it is admissible and conclusive.[4] When used as an estoppel in an action on another claim or demand, it is conclusive on any material fact, common to both,[5] which was actually controverted, litigated and de-

use and occupancy of her residence, does not estop her from maintaining a suit for permanent depreciation in the value of her property which necessarily resulted from the improper construction and operation of such stock pens. Bramlette *v.* Louisville, etc., R. Co., 113 Ky. 300, 68 S. W. Rep. 145, 24 Ky. L. 180. "When a breach of warranty is unsuccessfully relied upon as a defense to a suit for the price" of goods sold, "it cannot subsequently afford a cause of action for damages." Drevet Mfg. Co. *v.* Moore Bros. Glass Co., 168 Fed. Rep. 246, 93 C. C. A. 522. A judgment for the defendant in a forcible entry proceeding is not available as *res adjudicata* in a subsequent forcible detainer proceeding as the question "whether the defendant was or was not guilty of having forcibly entered the demise had no relevancy to whether she had forcibly detained it after being legally required to surrender the possession." Johnson *v.* Gordon (Ky.), 118 S. W. Rep. 372.

[4] Wood *v.* Jackson, 8 Wend. 9, rev'g 3 Id. 27 (SEWARD); Lawrence *v.* Hunt, 10 Id. 81, 85 (S. P., NELSON, J.), Rosc. N. P. 205; modifying the rule of Ch. J. DE GREY, in Duchess of Kingston's Case, 20 How. St. Tr. 538, s. c., 2 Sm. L. Cas. 609; Krekeler *v.* Ritter, 62 N. Y. 372; Wright *v.* Butler, 6 Wend. 284, 288; Jackson *v.* Lodge, 36 Cal. 28. *Contra*, Bigelow on Est. 520, who is of opinion that it ought to be conclusive whenever it is admissible. Reasonable certainty is all that is required in the allegation. Gould *v.* Evansville, &c. R. R. Co., 91 U. S. (1 Otto) 526, 531. "If a party who has an opportunity to plead an estoppel upon which he relies, fails to do so, but goes to issue on the fact, he thereby waives the estoppel." Nickum *v.* Burckhardt, 30 Oreg. 464, 47 Pac. Rep. 788, 48 Pac. Rep. 474, 60 Am. St. Rep. 822. A judgment in an action on a contract for work, labor and materials, is not a bar to a subsequent action for fraud in inducing the plaintiff to enter into the contract where the fraud was not discovered until after the former judgment was obtained. Kahn *v.* Witkoski, 115 N. Y. Supp. 138.

[5] Thus, a judgment defeating an action on one of two instruments given as one transaction, upon the ground of want of authority, or of fraud, or discharge, common to

termined in the former action, and on those only.[6] In all cases therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated or determined in the original action, not what might have been thus litigated and determined.[7]

both, is a bar to an action between the same parties, upon the other instrument. Aurora City *v.* West, 7 Wall. 82, 96; Bouchaud *v.* Dias, 3 Den. 243; Gardner *v.* Buckbee, 3 Cow. 120. A judgment establishing the existence of a fact is conclusive between the parties even when that fact "comes incidentally in question in relation to a different matter, in the same or any other court, except on appeal." Reed *v.* Cross, 116 Cal. 473, 48 Pac. Rep. 491. "'Where the second action between the same parties is upon a different claim or demand, the judgment in a prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered.'" Baldwin *v.* Hanecy, 204 Ill. 281, 68 N. E. Rep. 560.

[6] Cromwell *v.* County of Sac, 94 U. S. (4 Otto) 351, 353; Davis *v.* Brown, Id. 423. Where an offer to introduce in evidence a judgment, which by itself is admissible, includes also various papers which are clearly inadmissible, the whole offer must be excluded. Hidy *v.* Murray, 101 Iowa, 65, 69 N. W. Rep. 1138. "Where one action is pleaded in bar of another, as *res adjudicata*, there must generally be 'identity of parties, of subject matter and of cause of action to constitute the first a bar to the second. Where, however, some controlling fact or question material to the determination of both of the causes has been adjudicated in the former suit by a court of competent jurisdiction, and the same fact or question is again at issue between the same parties, its adjudication in the first, will, if properly presented, be conclusive of the same question in the later suit, irrespective of whether the cause of action is the same in both suits or not.'" Baldwin *v.* Hanecy, 204 Ill. 281, 68 N. E. Rep. 560. But it has been said that "a judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial or unessential facts, even though put in issue by the pleadings and directly decided." Cahnmann *v.* Metropolitan St. R. Co., 37 Misc. Rep. 475, 75 N. Y. Supp. 970.

[7] Id.

A judgment although not constituting an estoppel may be admissible in a subsequent suit as evidence of an assertion of a right by a party. Lochridge *v.* Corbett,

In cases of either class it is conclusive, although the facts necessary to show that the same question was determined are shown by parol,[8] under rules below stated.

One who pleads and proves a judgment as a former adjudication, in respects favorable to him is concluded by it in respects in which it is unfavorable to him, although it might not otherwise be conclusive in such respects.[9]

The fact that a judgment does not prove the entire case of a plaintiff does not render it inadmissible if it proves any material fact of his case.[10]

31 Tex. Civ. App. 676, 73 S. W. Rep. 96. "The plea of *res adjudicata* in tax cases is to be limited to the taxes actually in litigation, and . . . the judgment is not conclusive in respect of taxes assessed for other and subsequent years." State *v.* Enloe, 121 Tenn. 347, 117 S. W. Rep. 223. Where a plaintiff recovered a judgment for nominal damages for a continuing trespass, no damages having been claimed for permanent injuries, and the action having been brought only to establish the plaintiff's right, he could subsequently bring a bill in equity to restrain the defendant from continuing the trespass. Davis *v.* Southwest Pennsylvania Pipe Lines, 223 Pa. 56, 72 Atl. Rep. 281.

[8] Walker *v.* Chase, 53 Me. 258. Compare Russell *v.* Place, 94 U. S. (4 Otto) 606.

[9] United Society of Shakers *v.* Underwood, 11 Bush, 265, s. c., 21 Am. Rep. 214, 219. Estoppels must be mutual and both "litigants must be alike concluded, or the proceedings in the prior action cannot be set up as conclusive upon either," Whitcomb *v.* Hardy, 68 Minn. 265, 71 N. W. Rep. 263; Allred *v.* Smith, 135 N. C. 443, 47 S. E. Rep. 597, 65 L. R. A. 924; Dodd *v.* Mayfield, 99 Ga. 319, 25 S. E. Rep. 698. A plaintiff, in relying on an estoppel, "is also estopped from asserting any facts to the contrary of that on which it is founded." Buford *v.* Adair, 43 W. Va. 211, 27 S. E. Rep. 260, 64 Am. St. Rep. 854. A former judgment cannot be attacked collaterally in an action for relief which might have been had in the former action. Com. *v.* Churchill, 131 Ky. 251, 115 S. W. Rep. 189.

[10] Carleton *v.* Lombard, Ayres & Co., 149 N. Y. 137, 43 N. E. Rep. 422. Plaintiff, who was employed for one year at a fixed salary payable in weekly installments was discharged during that period and two weeks afterwards he brought an action to recover two installments of his salary and recovered a judgment. This action was brought after the expiration of the period of employment, to recover the salary for the balance of the year. The court held that the judgment in the former action conclusively established the wrong-

5. What Questions are Concluded.

An adjudication when used as an estoppel in another action between the same parties upon the same claim or demand, is conclusive, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.[11]

fulness of such discharge and confined the defense to proof of payment or release or in mitigation of damages. Allen *v.* International Text Book Co., 201 Pa. St. 579, 51 Atl. Rep. 323, 88 Am. St. Rep. 834.

[11] Hartnett *v.* Adler, 1 N. Y. Supp. 321; Weiser *v.* Kling, 38 App. Div. 266, 57 N. Y. Supp. 48; Dowell *v.* Applegate, 152 U. S. 327, 14 S. Ct. 611, 38 L. ed. 463; Griffin *v.* Hodshire, 119 Ind. 235, 21 N. E. Rep. 741; Hein *v.* Westinghouse Air Brake Co., 172 Fed. Rep. 524; St. Louis, etc., R. Co. *v.* Wabash R. Co., 152 Fed. Rep. 849, 81 C. C. A. 643; Peo. *v.* Griesback, 127 Ill. App. 462; Hewitt *v.* Great Western Beet Sugar Co., 230 Fed. Rep. 394, 144 C. C. A. 536; Cromwell *v.* County of Sac, 94 U. S. (4 Otto) 351, 352. A judgment is not available as evidence, in a subsequent action for another cause between the same parties, to establish any fact not material to the adjudication actually made in the former action. Cauhape *v.* Parke, Davis & Co., 121 N. Y. 152, 24 N. E. Rep. 185. The rule of *res adjudicata* "extends to every question in the proceedings which was legally cognizable, and applies whenever a party has neglected the opportunity of trial, or has failed to present his cause or defense in whole or in part under the mistaken belief that the matter would remain open and could be made the subject of another proceeding." Raisig *v.* Graf, 17 Pa. Super. Ct. 509. No judgment can be had for relief which might have been had in a former suit if proper evidence had been adduced. Com. *v.* Churchill (Ky.), 115 S. W. Rep. 189. But when an action *ex contractu* was voluntarily dismissed against one of the defendants on demurrer, the plaintiff was not estopped from suing the defendant who had prevailed on the demurrer in the previous action, for fraudulent representations. Runge *v.* Brown, 23 Neb. 817, 37 N. W. Rep. 660. In an action for specific performance of a contract, the defendant, who had previously brought an unsuccessful suit to cancel the contract on the ground that it had been obtained by fraud, and executed on a Sunday, cannot again put in issue the validity of the contract on other grounds than those specified in the first suit. Rosenstein *v.* Burr, 80 N. J. Eq. 424, 83 Atl. Rep. 785. "It is undoubtedly a settled principle that a party seeking to enforce a claim,

If a record or judicial proceeding shows material declarations or admissions of a party to the same, it may be offered in evidence in behalf of one who was not a party, but it will not be conclusive against the party who made the declarations or admissions.[12]

6. Construction of Instrument.

The construction of a contract determined in an action between the parties, is conclusive on them in another action on subsequently accruing claims on the same clauses.[13] Where a former adjudication on the construction, even of a statute, is relied on, the party need not prove again the facts which led the court to give such construction to the statute.[14]

7. Courts and Tribunals.

The rule that a former adjudication is an estoppel, is applied not only to the adjudications of domestic courts, in-

legal or equitable, must present to the court, either by the pleadings or proofs or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal." Stark *v.* Starr, 94 U. S. 477, 24 L. ed. 276.

[12] Murphy *v.* Hindman, 58 Kans. 184, 48 Pac. Rep. 850. Testimony of witnesses since deceased, given in an action of replevin against a sheriff for wrongful retention of property may be read in evidence in a subsequent action of trover by the same plaintiff against the sureties on his bond. Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. Rep. 705, 58 L. R. A. 417.

[13] Tioga R. R. Co. *v.* Blossburg, &c. R. R. Co., 20 Wall. 137, 143, and cases cited. Saco Brick Co. *v.* J. P. Eustis Mfg. Co., 207 Mass. 312, 93 N. E. Rep. 629; Royal Live Fish Co. *v.* Central Fish Co., 159 App. Div. 151, 144 N. Y. Supp. 21; Idalia Realty, etc., Co. *v.* Nooman, 259 Mo. 619, 168 S. W. Rep. 749.

[14] Wood *v.* Mayor, &c. of N. Y., 73 N. Y. 556. "A judgment in an action in which questions of law are alone involved is as conclusive between the parties as a judgment in an action, involving issues of fact as well as of law." Henck *v.* Barnes, 84 Hun, 546, 32 N. Y. Supp. 840. The preceding case involved the construction and legal effect of a written instrument, adding to the provisions of a lease but of which an assignee of the lease (the plaintiff) had no notice. Such instrument had been con-

ferior [15] or superior, but, with due qualification as to jurisdictional questions, to the adjudications of competent tribunals in foreign countries, to sentences of courts of admiralty, to those of ecclesiastical tribunals, and, in short, of every court which has proper cognizance of the subject-matter,[16]

strued in a previous action and such construction was set up successfully as *res adjudicata* in the present action.

[15] Routledge *v.* Hislop, 2 Ellis & E. 549; Jackson *v.* Wilkerson, 160 Fed. Rep. 623, 87 C. C. A. 525; Lewine *v.* Gerardo, 60 Misc. 261; Marsteller *v.* Marsteller, 132 Pa. St. 517, 19 Atl. Rep. 344, 19 Am. St. Rep. 604. The determination by a county court, of a matter over which it has jurisdiction, is a bar to another action between the same parties for the same relief brought in the supreme court. Andrews *v.* Horton, 66 Misc. 66, 120 N. Y. Supp. 131. The decision of the supreme court is, when returned to a lower court, the law of the case only in so far as the facts remain the same. Eckert *v.* Binkley, 134 Ind. 614, 33 N. E. Rep. 619, 34 N. E. Rep. 441. A decision of the highest state court declaring the constitutionality of a state statute is *res adjudicata* in a federal court sitting in that state. Estill County *v.* Embry, 112 Fed. Rep. 882, 50 C. C. A. 573; or on any matter over which the State Court has jurisdiction. Stewart *v.* Park College, 156 Fed. Rep. 773, 84 C. C. A. 451. "Although the presumption in every stage of a cause in a Circuit Court of the United States is that the court is without jurisdiction unless the contrary affirmatively appears from the record, . . . yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity." Chesapeake, etc., R. Co. *v.* McCabe, 213 U. S. 207, 29 S. Ct. 430, 53 L. ed. 765. A creditor of a bankrupt "having voluntarily gone into the bankruptcy court, and submitted itself to the jurisdiction of that court, and filed its claim against the bankrupt's estate . . . and that court having disallowed the claim and entered judgment accordingly, . . . that judgment . . . constitutes a complete bar to" a subsequent action in another jurisdiction against the bankrupt. Hargadine McKittrick Dry Goods Co. *v.* Hudson, 122 Fed. Rep. 232, 58 C. C. A. 596.

[16] Hopkins *v.* Lee, 6 Wheat. 109; Smith *v.* Kernochan, 7 How. (U. S.) 198. But a judgment of the supreme court including a finding of fact that a decedent died intestate is not *res adjudicata* in a proceeding to probate the decedent's will, which was found before the entry of judgment. Matter of Connell, 75 Misc. 574, 136 N. Y. Supp. 166. Where the existence, effect, or application of the former judgment is in issue, the question

if the adjudication is conclusive by the law of the foreign jurisdiction; and in a qualified degree, to decisions of other bodies than those which are strictly judicial.[17]

It is a general rule that where a particular authority is confided to a public officer to be exercised by him in his discretion, upon an examination of facts, of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of those facts.[18]

An award is in the nature of a former adjudication under these rules.[19]

8. Exclusive Jurisdiction.

An adjudication by a court of exclusive jurisdiction is

should be decided by the court by an inspection of the record, and it is error to submit it to the jury. Davis *v.* Trump, 43 W. Va. 191, 27 S. E. Rep. 397, 64 Am. St. Rep. 849. Where actions between the same parties are pending in two courts of concurrent jurisdiction "it is not the final judgment in the first suit, but the first final judgment, although it may be in the second suit, that renders the issues in such a case *res adjudicata* in the other court." Boatmen's Bank *v.* Fritzlen, 135 Fed. Rep. 650, 68 C. C. A. 288.

[17] See Big. on Est. 14. As to the conclusive effect of decisions of church judicatories, see Connitt *v.* Reformed Protestant Dutch Church of New Prospect, 54 N. Y. 551, 4 Lans. 339, and cases cited. The action of a ministerial board which is endowed with judicial functions is conclusive of the rights which it determines until its action is reversed in direct proceedings brought for that purpose. Longinette *v.* Shelton (Tenn. Ct.), 52 S. W. Rep. 1078. Under the Nebraska statute the disallowance of a claim by a County Board is not such an adjudication as will bar a subsequent action in the courts on the same claim. Custer County *v.* Chicago, etc., R. Co., 62 Neb. 657, 87 N. W. Rep. 341.

[18] Allen *v.* Blunt, 3 Story, 745. For the discussion of this principle, and the distinction between revising the decision of the officer, and applying to equity for the benefit of it for another than the one in whose favor it was made, see Martin *v.* Mott, 12 Wheat. 19; Gould *v.* Hammond, 1 McAll. 235; Lindsey *v.* Hawes, 2 Black. 554, and cases cited; State of Minnesota *v.* Bachelder, 1 Wall. 109; Stark *v.* Starrs, 6 Id. 402; Silver *v.* Ladd, 7 Id. 219; U. S. *v.* Wright, 11 Id. 648; Johnson *v.* Towsley, 13 Id. 72.

[19] Brazill *v.* Isham, 12 N. Y.

necessarily conclusive on all other courts, no matter in what controversy adduced,[20] subject, however, to impeachment for fraud or want of jurisdiction. When adduced in the same court, it only binds the subject-matter as between parties and privies.[21]

9. Parties.

The term "parties," in these rules, includes not only the actual parties to the particular litigation but also all persons who claim under them as privies,[22] and all who have a direct interest in the subject-matter of the suit, or have a right to

9, affi'g 1 E. D. Smith, 437. See Chapter XXIV.

[20] Gelston *v.* Hoyt, 3 Wheat. 246; Case of Broderick's Will, 21 Wall. 503.

[21] The Mary, 9 Cranch, 126.

[22] Garlington *v.* Fletcher, 111 Ga. 861, 36 S. E. Rep. 920; Monroe *v.* Turner, 114 App. Div. 634, 100 N. Y. Supp. 27; Big. on Est. 75. One claiming in privity with another, whether by blood, estate or law, occupies the same situation with such other as to any judgment for or against him, and the record of the judgment is equally admissible as evidence against either. Woods *v.* Montevallo Coal, &c. Co., 84 Ala. 560, 5 Am. St. Rep. 393, 3 So. Rep. 475. For instance, a different person succeeding to the same trust. Verplanck *v.* Van Buren, 76 N. Y. 247, 256, rev'g 11 Hun, 328; but not the same person appearing individually in the earlier case, and as trustee in the later. Rathbone *v.* Hooney, 58 N. Y. 463; and chapter V, paragraph 128 of this vol. Assignor and assignee of a chose in action. Chew *v.* Brumagen, 13 Wall. 497. Compare chapter I, paragraph 27–30 of this vol. Persons purchasing *pendent lite*. Craig *v.* Warp. 1 Abb. Ct. App. Dec. 454. A corporation in which a previous corporation had become merged. Phila., &c. R. R. Co. *v.* Howard, 13 How. (U. S.) 307. Creditors may be concluded by a judgment, to which an assignee in trust for them was a party. Kerrison *v.* Stewart, 93 U. S. (3 Otto) 155, 160. Persons not parties to proceedings in a court of equity for distribution of a common fund among the claimants, are not concluded by the decree (if notice was not given and they were not guilty of neglect), from proceeding on their own behalf, if they intervene before distribution. Matter of Howard, 9 Wall. 175, 186, and cases cited. Compare Kerr *v.* Blodgett, 48 N. Y. 62, 16 Abb. Pr. 137, s. c., 25 How. Pr. 303. "Tenants in common are not privies, and are therefore not bound by judgments rendered in actions brought by one of their cotenants respecting the common

make a defense, or control the proceedings,[23] to adduce and cross-examine witnesses, and to appeal;[24] or who have assumed to do so.[25]

property." Allred *v.* Smith, 135 N. C. 443, 47 S. E. Rep. 597, 65 L. R. A. 924.

[23] Bates *v.* Stanton, 1 Duer, 79. A judgment against a purchaser of goods for damages on account of defects therein is, so far as the issues in the cases are identical, admissible in his favor in a subsequent action by him against his vendor, who was notified of and participated in the trial of the former action. Carleton *v.* Lombard, Ayres & Co., 149 N. Y. 137, 43 N. E. Rep. 422. As a general rule, in an action upon a bond of indemnity against judgment, the sureties thereon are concluded, by the judgment recovered against the obligee, from questioning, except for fraudulent collusion for the purpose of charging the sureties, the existence or extent of his liability in the action wherein it was rendered. Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. Rep. 439. Where, however, the judgment was taken by consent of the obligee, while he is not excluded from the protection of the indemnity, the judgment is presumptive evidence only against the sureties, and they are at liberty to show that it was not founded upon any legal liability or that it exceeds such liability. (Id.) "At common law a mere surety for the payment of a debt, without any agreement, express or implied, to be bound by a suit between the principal parties, is not concluded by its determination." Grafton *v.* Hinkley, 111 Wis. 46, 86 N. W. Rep. 859. "A judgment against the principal, upon official bonds and bonds by parties to suits, and proceedings in court or relating to the result of a suit or proceeding, is conclusive upon the surety." Wanack *v.* Peo., 187 Ill. 116, 58 N. E. Rep. 242. A judgment against a saloon keeper for violation of a city ordinance, is available to the sureties on his bond as *res adjudicata*. Jenkins *v.* Danville, 79 Ill. App. 339. "When the State is to be bound by proceedings to collect taxes by suits at law or in equity, or other debts due the State, it must appear by the attorney-general of the State." State *v.* Enloe, 121 Tenn. 347, 117 S. W. Rep. 223.

[24] 1 Greenl. Ev., § 535. The judgment in a mandamus action brought against a city treasurer is conclusive against the city as to the issues therein adjudicated where it appears that the treasurer "did not defend the action for his personal benefit, but in right of the city, and, as custodian of its funds, to protect them against an

[25] Big. on Est. 47. "One who for his own interest joins in the defense of a suit to which he is not a party of record, is as much concluded by the judgment as if he had been a party thereto, provided

The rule does not make an adjudication evidence against a stranger,[26] nor against new parties not in privity, nor in

illegal demand." Ransom *v.* Pierr, 101 Fed. Rep. 665, 41 C. C. A. 585. A judgment in a certiorari proceeding sustaining an assessment against the relator is *res adjudicata* in a subsequent suit in equity to set aside the assessment although the first proceeding was against the common council of the city and the second against the city itself. Keller *v.* McVernon, 23 App. Div. 46, 48 N. Y. Supp. 370.

The fact that a defendant was sued in one action in his official capacity as assignee of an insolvent, will not necessarily prevent the judgment from being *res adjudicata* in a subsequent suit over the same subject matter brought against him in his individual capacity. Sunkler *v.* McKenzie, 127 Cal. 554, 59 Pac. Rep. 982, 78 Am. St. Rep. 86.

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his conduct in that respect was open and avowed or otherwise well known to the opposite party." Penfield *v.* Potts, 126 Fed. Rep. 475, 61 C. C. A. 371. Where a city attorney entered into a stipulation that a suit about to be brought against the city should abide the result of a test case involving the same facts, the judgment in that test case is available as an estoppel against the city. Bank of Commerce *v.* Louisville, 88 Fed. Rep. 398.

[26] Hurst *v.* McNeil, 1 Wash. C. Ct. 70; Matthews *v.* Menedger, 2 McLean, 145; Booth *v.* Powers, 56 N. Y. 22, rev'g Flint *v.* Craig, 59 Barb. 319. "In truth there is no possible ground on which a reported case can be made evidence of the facts stated therein, against a stranger." GRIDLEY, J., Seymour *v.* Marvin, 11 Barb. 80, 86; but see first note of this chapter. But a judgment *in personam*, like a deed or other muniment of title, in case it is a link in the chain of the title of one of the litigants, is admissible in evidence against the other, though a stranger to it. Barr *v.* Gratz's, 4 Wheat. 213; Webb *v.* Den, 17 How. (U. S.) 576; Buckingham *v.* Hanna, 2 Ohio St. 551; Davies *v.* Lowndes, 1 Bing. (N. C.) 597–606; Greenleaf *v.* Brooklyn, &c. R. Co., 132 N. Y. 408, 413, 414, 30 N. E. Rep. 762. A decree of divorce is not evidence in another suit except in a case in which the same parties, or their privies, are litigating in regard to the same subject of controversy. Belknap *v.* Stewart, 38 Neb. 304, 41 Am. St. Rep. 729, 56 N. W. Rep. 881; Kowal *v.* Lehrman, 144 App. Div. 219, 128 N. Y. Supp. 968. "Identity of names is presumptive, but it is not conclusive, proof of identity of persons." Fowler *v.* Stebbins, 136 Fed. Rep. 365, 69 C. C. A. 209. The judgment in an action by a principal against an agent, for fraud in securing certain notes and deeds which the agent ne-

favor of new parties not in privity, against whom the judgment had it been adverse would not have been available.[27]

If the parties are not nominally the same, extrinsic evidence is competent[28] and necessary [29] to show the identity.

gotiated, cannot be admitted in evidence in an action against the purchasers of the notes and deeds, inasmuch as they were not parties to the prior suit. Sill *v.* Pate, 230 Ill. 39, 82 N. E. Rep. 356. A judgment in favor of a tenant in an action of ejectment does not constitute an estoppel in favor of his lessor unless it appears that the lessor actually appeared in the action as a party and defended it as such. The mere employment of an attorney for the tenant is not in itself sufficient. Loftis *v.* Marshall, 134 Cal. 394, 66 Pac. Rep. 571, 86 Am. St. Rep. 286. Where, it appears that several promissory notes supported by the same consideration were executed and came into the hands of different third persons, and that the maker defended an action by one of such holders on the ground of failure of consideration, and lost, he is not estopped from asserting a similar defense to an action brought by a holder of another of such notes. Dodd *v.* Mayfield, 99 Ga. 319, 25 S. E. Rep. 650.

[27] Baring *v.* Fanning, 1 Paine, 549. A judgment in an action brought by a married woman to recover damages for personal injuries, is not conclusive in an action by her husband to recover for loss of his wife's services. Berg *v.* Third Ave. R. R., 89 N. Y. Supp. 433. Where lessor and lessee railroad companies are at law both liable for the negligence of the operating company, a judgment against one is a bar to a subsequent action against the other based on the same facts. Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, 65 N. E. Rep. 717. "To seek a remedy against the wrong person does not deprive a plaintiff of his remedy against the right party." Dumois *v.* New York, 37 Misc. 614, 76 N. Y. Supp. 161. "Wherever there are several concurrent remedies for the same cause of action, in favor of the same person, against several different persons, judgment against one will not bar a suit against another. There must be satisfaction." Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. Rep. 705, 58 L. R. A. 417.

[28] Stevelie *v.* Read, 2 Wash. C. Ct. 274; Evans *v.* Patterson, 4 Wall. 224, 231. The judgment in an action on an account stated, against two partners, and determined on the merits, is a bar to a subsequent action against one of the partners upon the same account stated, and it is competent to show by parol evidence that the cause of action in the two cases was identical. Reitman *v.* Creamer, 26 Misc. 732, 56 N. Y. Supp. 1078.

[29] Greely *v.* Smith, 3 Woodb. & M. 236. When a public officer is a party to a suit, a judgment

The fact that there were other parties in the former suit who are also estopped, does not render the former decision any less conclusive against him who is a party to both.[30]

10. Joint Defendants.

Where the contract is joint and not joint and several, a judgment against one debtor merges the entire cause of action, even without proof of satisfaction, and bars an action.[31] Otherwise, under the special statutes as to joint debtors.[32] In actions for wrongs whether to person or property, a previous recovery against a joint wrongdoer, on account of the same wrong, is not a bar unless satisfaction is proved.[33]

against his predecessor may be *res adjudicata*. New Orleans *v.* Citizens' Bank, 167 U. S. 371, 17 S. Ct. 905, 42 L. ed. 202.

[30] Dows *v.* McMichael, 6 Paige, 139; Thompson *v.* Roberts, 24 How. (U. S.) 233. Where action was brought against a city and certain tax payers intervened in defense of the action, the judgment against the plaintiff may be pleaded by the city in bar of a second action on the same demand although the defense which prevailed was one which but for the presence of the intervenors could not have been interposed. Smith *v.* St. Paul, 111 Fed. Rep. 308, 49 C. C. A. 357. The fact that an additional party was brought into the former action does not effect the judgment in that action as an estoppel. Whitcomb *v.* Hardy, 68 Minn. 265, 71 N. W. Rep. 263.

[31] Mason *v.* Eldred, 6 Wall. 231, 238, reviewing cases. In Illinois a judgment against one partner on a joint note does not merge the entire cause of action, and where there has been no satisfaction of the judgment, the judgment does not operate as a bar to an action against the partners who were not served. Finch *v.* Galigher, 181 Ill. 625, 54 N. E. Rep. 611. Although the plaintiff in agreeing to the entry of a judgment by compromise dismissing his action did not understand that the action was being dismissed as to one of the defendants, still the judgment is *res adjudicata* as to that defendant until set aside. Fidelity, etc., Co. *v.* Neely, 122 La. 1036, 48 So. Rep. 446.

[32] Id.

[33] Lovejoy *v.* Murray, 3 Wall. 1, citing the conflicting cases. The contrary is held in Virginia and Rhode Island. Otherwise where the wrongdoers are sued jointly, and judgment is taken against one only. Cameron *v.* Conrich, 201 Mass. 451, 87 N. E. Rep. 605. "Nothing short of satisfaction, or its equivalent, can make a good plea of former judgment in trespass, offered as a bar in an action

11. Form of the Adjudication.

The rule is applicable to adjudications at law or in equity,[34] unless the adjudication was upon the ground that the party had mistaken his remedy. It extends not not only to ordinary judgments at law, and decrees in equity,[35] but also to

against another joint trespasser, who was not a party to the first judgment." Woodworth *v.* Gorsline, 30 Colo. 186, 69 Pac. Rep. 705, 58 L. R. A. 417. "An unsatisfied judgment rendered against a sheriff individually for the conversion of personal property seized by him under a writ of attachment, and which is the property of a stranger to the writ" does not "constitute a bar to a subsequent suit upon the same cause of action, brought against the sheriff and his sureties upon his official bond." Gray *v.* Noonan, 6 Ariz. 36, 53 Pac. Rep. 7. The voluntary dismissal of an action in tort, as against some of the defendants, not on the merits, is not a bar to another action by the same plaintiff against the same defendants. Hukill *v.* Maysville, etc., Co., 72 Fed. Rep. 745. "A judgment in an action of assumpsit, brought by a husband and wife, on a contract by a carrier of passengers to carry the wife safely, for injuries to the wife while being carried, is a bar to another action of assumpsit on the same contract, by the husband alone, to recover for the same injuries. A different rule prevails when the action is in tort against the carrier for a breach of his public duty, except, perhaps, in States like New Jersey, where by statute the husband may, in such an action, add claims in his own right to those of his wife." Pollard *v.* New Jersey R., etc., Co., 101 U. S. 223, 25 L. ed. 840. Where two partners sue for damages to copartnership property caused by a collision with a street car, the judgment is not *res adjudicata* in a subsequent action by one of the parties for personal injuries also sustained by him, but is available as an estoppel "upon the question of defendant's negligence and the question of plaintiff's contributory negligence in the matter of the collision complained of." Cahnmann *v.* Metropolitan St. R. Co., 37 Misc. Rep. 475, 75 N. Y. Supp. 970.

[34] Bank of U. S. *v.* Beverly, 17 Pet. 127. A bill in equity is not relieved from the plea of *res adjudicata* by the fact that different equitable grounds are alleged in support of the second bill. Barnes *v.* Huntley, 188 Mass. 274, 74 N. E. Rep. 318, 108 Am. St. Rep. 471. A judgment of a court declining to take jurisdiction of a claim does not prevent the claimant from subsequently suing in a court having proper jurisdiction of the action as the judgment is not on the merits. Com. *v.* McCue, 109 Va. 302, 63 S. E. Rep. 1066.

[35] Smith *v.* Kernochen, 7 How.

a judgment by default;[36] and to a judgment by confession, on facts appearing on the record,[37] and to adjudications on adverse rights as between co-defendants.[38] A *nonsuit* at law, or what is equivalent,[39] a dismissal of complaint in an action of a legal nature under the new procedure, for reasons which would be cause of nonsuit at common law,[40] is not a bar, unless it affirmatively appears that it was granted upon a determination of the merits of the same controversy.[41] A

(U. S.) 198. As to interlocutory decree, compare Rumford Chem. Works *v.* Hecker, 10 Pat. Off. Gaz. 289; Stovall *v.* Banks, 10 Wall. 583, 587. The fact that the former judgment pleaded and proved by the defendant as a bar, is defective in form and grammar, will not defeat such a plea so long as the judgment was intelligible on the main questions decided. Plaintiff's remedy in that case would be a motion to have the judgment corrected. Davis *v.* Trump, 43 W. Va. 191, 37 S. E. Rep. 397, 64 Am. St. Rep. 849.

[36] Dickson *v.* Wilkinson, 3 How. (U. S.) 57.

[37] Big. on Est. 18, 20. It is immaterial that the former judgment was entered by agreement. Com. *v.* Churchill (Ky.), 115 S. W. Rep. 189.

[38] Corcoran *v.* Chesapeake, &c. Canal Co., 94 U. S. (4 Otto) 741; Craig *v.* Ward, 1 Abb. Ct. App. Dec. 454. See also Baldwin *v.* Hanecy, 204 Ill. 281, 68 N. E. Rep. 560.

[39] Holton *v.* Gleason, 26 N. H. (6 Fost.) 501; Greely *v.* Smith, 1 Woodb. & M. 181, 3 Id. 236; Homer *v.* Brown, 16 How. (U. S.) 354; Mich. Ins. Bk. *v.* Eldred, 6 Biss. 370. A dismissal of a bill in equity "without prejudice or for want of prosecution, operates only as a nonsuit at law, which leaves the plaintiff at liberty to begin over if so advised." Conant *v.* Boston Chamber of Commerce, 201 Mass. 479, 87 N. E. Rep. 906.

[40] Wheeler *v.* Ruckman, 51 N. Y. 391. And by N. Y. Code Civ. Pro., § 1209, a judgment of dismissal in any action thereafter commenced, does not bar a new action for the same cause of action, unless it expressly declares, or it appears by the judgment-roll, that it is rendered upon the merits. Whether an absolute dismissal of a bill in equity is a bar, compare Wheeler *v.* Ruckman (above); Durant *v.* Essex Co., 7 Wall. 107, 109; United States *v.* Lane, 8 Id. 185, 201; Allen *v.* Blunt, 5 Woodb. & M. 121; Lessee of Wright *v.* Deklyne, 1 Pet. C. Ct. 199.

[41] Parks *v.* Dunlop, 86 Cal. 189, 25 Pac. Rep. 916; Smith *v.* Ferris, 1 Daly, 18. The general entry of the dismissal of a suit by agreement is evidence of an intention not to abandon the claim on which it is founded, but to preserve the right to bring a new suit thereon, if it becomes necessary. Haldeman *v.* United States, 91 U. S.

demurrer, followed by judgment on the merits against the demurrant, is a bar; [42] but the bar rests rather on the judgment than on the demurrer. A *report* of a referee or similar finding in a court having power to arrest judgment and grant a new trial, [43] or a *verdict*, without judgment thereon, [44] or on which the judgment has been reversed, [45] is not an adjudication and is not admissible in a subsequent action.

An *order*, made on motion, is not conclusive in the same sense as a judgment; and to prove it the motion papers and evidence should be produced. [46] A *reversal*, remanding the

(1 Otto) 584, 586. A verdict by direction in an action of ejectment prematurely brought before the death of a person upon whose life the defendant's estate depends, is not a bar to a subsequent similar action seasonably brought. Currier *v.* Teske, 84 Neb. 60, 120 N. W. Rep. 1015, 133 Am. St. Rep. 602.

[42] Aurora City *v.* West, 7 Wall. 82, 98; Clearwater *v.* Meredith, 1 Wall. 25, 43; Gould *v.* Evansville, &c. R. R. Co., 91 U. S. (1 Otto) 526, 533; Dillavou *v.* Dillavou, 142 Iowa, 291, 120 N. W. Rep. 628. "Where a demurrer runs to the merits of the case, the judgment of the court sustaining it and dismissing the appeal is a judgment upon the merits . . . and is a bar to any subsequent suit between the said parties upon the same cause of action." But a judgment sustaining a demurrer for misjoinder of causes of action will not support a plea of *res adjudicata*. Goldsborough *v.* Hewitt, 23 Okl. 66, 99 Pac. Rep. 907, 138 Am. St. Rep. 795.

[43] Leonard *v.* Barker, 5 Den. 220.

[44] Reed *v.* Proprietors of Locks, 8 How. (U. S.) 274, 291; Allen *v.* Blunt, 3 Story C. Ct. 742, 746. "'In order to support the plea of *res adjudicata* there must have been a final judgment or decree rendered in the former action or suit.'" McKinnon *v.* Johnson, 57 Fla. 120, 48 So. Rep. 910.

[45] Smith *v.* McCool, 16 Wall. 560. The action of the trial court in striking out a part of the cause of action does not save that item for another suit when the error in so doing might have been corrected on appeal. Peacock *v.* Coltrane (Tex. Civ. App.), 116 S. W. Rep. 389.

[46] Alkus *v.* Rodh, 4 Daly, 397. "Orders made upon motion become *res adjudicata* only to prevent another motion without leave to renew, but such motions are usually those which affect the conduct of the action and are not determinative of final rights. It is otherwise where the question of absolute right is disposed of upon application of the party seeking to assert her claim later on, and a hearing had after an investigation upon the merits should determine for all

cause for new trial, is not a bar unless it directly affirms or denies some point in issue.[47]

12. Record to Be Produced.

The record, or a copy properly authenticated,[48] must be produced,[49] or accounted for, so as to let in secondary evidence. If the record be lost, the regularity of the proceedings and the sufficiency of the evidence given on the former trial are presumed.[50] Unless a foundation is laid for secondary evidence, oral evidence is not competent to show the contents of parts of the record not produced.[51] The reported decision of the court is not primary evidence of the adjudica-

future purposes the same question litigated between the same parties to prevent unnecessary litigation, and to lead to a security of title upon which all those interested in the future may rely." De Biase *v.* Hartfield, 33 Misc. 316, 68 N. Y. Supp. 468.

[47] Harvey *v.* Richards, 2 Gall. 216; Aurora City *v.* West, 7 Wall. 82, 106. Where the case is remanded, the judgment of the lower court must be examined to ascertain if the plea of former adjudication is sufficient. Franklin School Tp. *v.* Wiggins, 142 Iowa, 377, 120 N. W. Rep. 1032.

[48] See chapter XXIX, paragraph 5, of this vol. Parties claiming an estoppel by judgment should set up the entire record so that the court may determine what was in litigation and what was adjudged. Allred *v.* Smith, 135 N. C. 443, 47 S. E. Rep. 597, 65 L. R. A. 924.

[49] Davisson *v.* Gardner, 10 N. J. L. (5 Halst. 289); Thelluson *v.* Sheldon, 2 New R. 228; Mackay *v.* Easton, 19 Wall. 619, 632. Failure to produce or account for it is a circumstance construed against the party. Clark *v.* Oakley, 4 Ark. 236. Where a judgment of the New York City Municipal Court is pleaded as *res adjudicata*, it is error to exclude the minutes of the trial offered "for the purpose of showing that the judgment was rendered for a dismissal of the complaint upon the merits." Stecher *v.* Independent Order F. S. J., 45 Misc. 340, 90 N. Y. Supp. 332.

[50] Trepagnier *v.* Butler, 12 Mart. (La.) 534. See the rules on this subject more fully stated in Chapter XIX.

[51] Lessee of James *v.* Stookey, 1 Wash. C. Ct. 330; Davisson *v.* Gardner, 10 N. J. L. (5 Halst.) 289. Where a bill, answer and decree are put in evidence to prove a fact which appears on the face of those documents to have been in issue, the party producing them is not bound also to put in the depositions as part of his own case. Rosc. N. P. 129, citing Laybourn *v.* Crisp, 4 M. & W. 320.

tion, though it can be referred to as an exposition of the law.[52] The record, or a copy, is not rendered incompetent by the fact that the record was not made up until after the commencement of the present action.[53]

13. What Questions were Determined By It.

The burden is on the party adducing the former adjudication, to show that the subject of the present suit was directly in issue in the former one,[54] and that the former decision necessarily involved a determination of the rights of the parties in respect to the question.[55] The fact that the writs or forms of action were different is not decisive, but the casues of action are regarded as the same, if the same evidence would support both.[56] Identity in the description of the cause of action stated in the two cases, with the fact that the names of parties and amount claimed are the same,

[52] Mackay *v.* Easton, 19 Wall. 619, 632. Where a former decree is relied on as *res adjudicata*, the opinion filed as required by law may be examined "for the purpose of determining the question of fact really settled and intended to be settled by the decision." Stearns *v.* Lawrence, 83 Fed. Rep. 738, 28 C. C. A. 66.

[53] Krekeler *v.* Ritter, 62 N. Y. 372; Rinchey *v.* Striker, 28 Id. 45, s. c., 26 How. Pr. 83. Or to reading the opinion of the court. See Miles *v.* Strong, 68 Conn. 273, 36 Atl. Rep. 55.

[54] Lonsdale *v.* Brown, 4 Wash. C. Ct. 86.

[55] Id., Lawrence *v.* Hunt, 10 Wend. 81. Judgments entered in violation of a Federal Statute (i. e. making null and void all judgments, etc., obtained within four months of filing of petition in bankruptcy) are not *res adjudicata* upon the question decided. Wilson *v.* Farmers Mut. F. Ins. Co., 184 Mich. 530, 151 N. W. Rep. 752. A judgment which merely establishes that a decree of the surrogate was not procured by fraud is not a bar to another action affecting the merits of the said decree. Matter of Weaver, 156 App. Div. 927, 141 N. Y. Supp. 1054.

[56] Hitchin *v.* Campbell, 2 Blacks. 827; Kitchen *v.* Campbell, 3 Wils. 304. "Where the evidence in the second suit would have been equally available in the first suit, then the verdict and judgment in the first is an absolute bar to any recovery in the second." Raisig *v.* Graf, 17 Pa. Super. Ct. 509. But the scope of the judgment does not necessarily depend upon the proof heard at the trial. Com. *v.* Churchill (Ky.), 115 S. W. Rep. 189.

is enough to throw on the other party the burden of showing that the causes of action were not the same.[57]

The presumption, in the absence of evidence to the contrary, is, that the decision was upon the merits.[58] If the record shows that the verdict or other adjudication could not have been had without deciding the particular matter now questioned, it will be considered as having finally determined it.[59] A record presenting fairly two points, on either of which the decision might turn, is conclusive on both, if the court fully considered and determined both, and the decision might as well have been put upon one as the other.[60] Where the parties and the cause of action are the same, the *prima facie* presumption is, that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue.[61] If the record produced does not disclose what was at issue and determined, extrinsic evidence is necessary.[62]

14. Oral Evidence to Explain Record.

For the purpose of showing what was determined, oral evidence that a question not involved in the pleadings was litigated, is not competent,[63] except in case of a justice's

[57] Lonsdale *v.* Brown (above); Agate *v.* Richards, 5 Bosw. 456.

[58] Stearns *v.* Stearns, 32 Vt. 678.

[59] Packet Co. *v.* Sickles, 5 Wall. 593. Every judgment may be construed and aided by the entire record in the case. Elizabethport Cordage Co. *v.* Whitlock, 37 Fla. 190, 20 So. Rep. 255.

[60] Hawes *v.* Contra Costa Water Co., 5 Sawy. 287. Where a bill *in equity* seeks to adjudicate the entire right of the parties before the court, the decree may be deemed conclusive, not only against grounds of claim which were set forth in the bill as false and pretended, but also against all other grounds. In re Chiles, 22 Wall. 157, 166; and see Aurora City *v.* West, 7 Id. 82.

[61] Gould *v.* Evansville, &c. R. R. Co., 91 U. S. (1 Otto) 526, 532. In the absence of any proof impeaching the fairness or justice of the claim or tending to show that the judgment exceeded the legal liability of the obligee, the amount thereof is the sum he is entitled to recover in an action upon the bond. Conner *v.* Reeves, 103 N. Y. 527, 9 N. E. Rep. 439.

[62] Davis *v.* Brown, 94 U. S. (4 Otto) 423.

[63] Campbell *v.* Butts, 3 N. Y. 173; Davis *v.* Tallcot, 12 N. Y. 184,

judgment.[64] Oral evidence, not inconsistent with the record,[65] is admissible to show what was litigated and the ground of the decision,[66]—for instance, to show the precise day of adjudication;[67] that the present cause of action had not

rev'g 14 Barb. 611. Oral testimony is not competent in a collateral suit to give a judgment of a circuit court a broader effect than its terms imply. Long *v.* Long, 14 Mo. 352, 44 S. W. Rep. 341. The conclusive effect of a judgment cannot be affected by parol evidence in a subsequent action. Com. *v.* Churchill (Ky.), 115 S. W. Rep. 189.

[64] Id., Doty *v.* Brown, 4 N. Y. 71. Where the pleadings and the docket of the judgment in an action in a justice's court, are insufficient to show what was really tried and determined, it is permissible to show, *aliunde*, that the justice tried and determined any fact which under the pleadings he might have examined and passed upon. Royce *v.* Burt, 42 Barb. 655. Where the transcript of the docket of a justice of the peace showed that the cause was tried by jury, and the following verdict was returned: "That the jury decided in favor of the plaintiff V. M. Donigan for the amount sued for, and for costs," it is sufficient to support a plea of *res adjudicata* as to a set-off pleaded by the defendant and actually litigated at the trial. Bemus *v.* Donigan, 18 Tex. Civ. App. 125, 43 S. W. Rep. 1052.

[65] While parol evidence may be received to show what was litigated upon the trial of a former action, it must be consistent with the record and cannot be admitted to contradict it. Lorillard *v.* Clyde, 122 N. Y. 41, 25 N. E. Rep. 292. The actual judgment must be consulted to determine what was decided in a former action and so far as the record shows, it must control. Gordon *v.* Van Cott, 38 App. Div. 564, 56 N. Y. Supp. 554.

[66] Reitman *v.* Shapiro, 62 Misc. 255, 114 N. Y. Supp. 887; Packet Co. *v.* Sickles, 5 Wall. 592; Miles *v.* Caldwell, 2 Id. 43; White *v.* Madison, 26 N. Y. 117, s. c., 26 How. Pr. 481; Kerr *v.* Hays, 35 N. Y. 331; Lawrence *v.* Cabot, 41 Super. Ct. (J. & S.) 122; Little *v.* Barlow, 37 Fla. 232, 20 So. Rep. 240; Carleton *v.* Lombard, Ayres & Co., 149 N. Y. 137, 43 N. E. Rep. 422. Provided such ground was within the issues in the case. Wood *v.* Jackson, 8 Wend. 9; Bowe *v.* Wilkins, 105 N. Y. 322, 329, 11 N. E. Rep. 839. It is competent to show by extrinsic evidence the identity of the demands in the two cases, if this does not appear on the face of the pleadings. Washington, Alexandria & Georgetown Steam Packet Co. *v.* Sickles, 24 How. 333; Miles *v.* Caldwell, 2 Wall. 35; Cromwell *v.* County of Sac, 94 U. S. 351, 355; Burthe *v.* Denis, 133 U. S. 514, 522, 523.

[67] Whitaker *v.* Wisbey, 12 C. B. 52, 12 L. J. C. P. 116. And a

accrued when the former judgment was rendered;[68] to connect a bill of particulars with the record;[69] to show the evidence given on the issue;[70] that the party supported his allegation by estoppel;[71] and that the finding or verdict was upon one rather than another of several issues.[72] And evidence that the judgment was upon a written instrument may be given without producing the instrument.[73]

If the record is silent as to whether the causes of action are the same, extrinsic evidence as to the ground of the verdict is competent.[74] But the extrinsic evidence should be confined to the points in controversy on the former trial, to the testimony given by the parties, and to the questions submitted to the jury for their consideration; and then the record furnishes the only proper proof of the verdict.[75] Evi-

variance from the day stated in the record, if that be fixed by legal fiction, is not deemed a contradiction of the record. Id.

[68] Marcellus *v.* Countryman, 65 Barb. 201.

[69] Marsh *v.* Pier, 4 Rawle, 273. But the parol evidence can be given only in aid of the record. Therefore where there is no record (i. e., no complaint filed) such evidence is not admissible. Person *v.* Roberts, 159 N. C. 168, 74 S. E. Rep. 322.

[70] State *v.* Thompson, 19 Iowa, 299. And a juror's testimony is competent. Whether the fact that the party offered no evidence at all, affects the conclusive character of the adjudication, compare Colwell *v.* Bleakley, 1 Abb. Ct. App. Dec. 400; Ramsey *v.* Harndon, 1 McLean, 450.

[71] Rider *v.* Union Ind. Rub. Co., 4 Bosw. 169.

[72] Rake *v.* Pope, 7 Ala. N. S. 161; Washington, &c. Steam P. Co. *v.* Sickles, 24 How. (U. S.) 333. While a former judgment between the same parties is *prima facie* a bar to another suit on the same claim, such presumption may be rebutted by showing that the demand in the second suit is distinct from the one in the first. Therefore two or more suits may be brought against the same parties, on the same claim, provided the claim consists of separate and distinct causes of action. Fox *v.* Phyfe, 36 Misc. 207, 73 N. Y. Supp. 149.

[73] Artcher *v.* McDuffie, 5 Barb. 147.

[74] Perkins *v.* Walker, 19 Vt. 144; Big. on Est. 34; Chicago, etc., R. Co. *v.* Schaffer, 124 Ill. 112, 16 N. E. Rep. 239.

[75] Packet Co. *v.* Sickles, 5 Wall. 593, and cases cited (NELSON, J.). The record of courts showing judgment by confession in open court imports verity, and cannot be contradicted by parol evidence. The record of such judgment is

dence of the secret deliberations of the jury, or the grounds of their proceedings in making up their verdict, is not competent.[76] The reasons given by the court upon the delivery of their judgment are competent to show the ground of it.[77] Oral evidence is not competent to contradict the record,[78] nor to show mistake in it.[79] Where the actual grounds of the judgment can be clearly discovered from the judgment itself, it is conclusive respecting the grounds, as well as respecting the actual matter decided.[80] The law and practice determining the form of judicial proceedings in a foreign court may be shown by parol.[81]

15. Set-off.

A claim which might have been interposed as a set-off, but was not, is not barred,[82] unless it is so involved in the facts out of which the former action arose, that to submit to

the only proper evidence of itself, and is conclusive of the fact of the rendition of the judgment, and of all the legal consequences resulting therefrom. Weigley *v.* Matson, 125 Ill. 64, 8 Am. St. Rep. 335, 16 N. E. Rep. 881.

[76] Id. Compare Marcellus *v.* Countryman, 65 Barb. 201. Testimony of the jurors in a former suit is not admissible in a subsequent action involving the same subject matter for the purpose of proving the manner of arriving at the damages where such evidence is at variance with the theory upon which the action was prosecuted. Oster *v.* Broe, 161 Ind. 113, 64 N. E. Rep. 918.

[77] Birckhead *v.* Brown, 5 Sandf. 134.

[78] Brintnall *v.* Foster, 7 Wend. 103. Nor even a justice's docket. Id.

[79] McPherson *v.* Cunliff, 11 Serg. & R. 422; Reed *v.* Jackson, 1 East, 355.

[80] Alison's Case, L. R. 9 Ch. App. 26; Sturtevant *v.* Randall, 53 Me. 149; Walker *v.* Chase, Id. 258.

[81] Fisher *v.* Fielding, 67 Conn. 91, 113, 34 Atl. Rep. 714.

[82] Moak's Van Santv. Pl. 636; Shankle *v.* Whitley, 131 N. C. 168, 42 S. E. Rep. 574; Beaty *v.* Johnston, 66 Ark. 529, 52 S. W. Rep. 129. "A failure of a defendant in an action to plead or prove facts purely defensive renders such matters *res adjudicata* after judgment, and conclusively estops him from again presenting them. . . . But where the facts which establish his defense also constitute an affirmative cause of action against the plaintiff, he has the option to interpose them as a defense, or to reserve them for an independent or cross action. If he refrains from

recovery on those facts, without interposing the set-off, amounts to an admission that there was no ground for such a set-off.[83]

Where it appears that the plaintiff presented, as a set-off in the former action, the claim now sued on and that it was disallowed, the burden is on him to show affirmatively that it could not legally have been allowed, to relieve himself from the effect of the former decision as a bar.[84] If the rec-

presenting them as a defense, the judgment in the action against him does not bar or adjudicate his affirmative cause of action upon them, and he is free to subsequently maintain it." Brown *v.* Newton First Nat. Bank, 132 Fed. Rep. 450, 66 C. C. A. 293; Watkins *v.* American Nat. Bank, 134 Fed. Rep. 36, 67 C. C. A. 110; Riddle *v.* McLester-Van Hoose Co., 145 Ala. 307, 40 So. Rep. 101. Where the plaintiff's cause of action could not be and was not pleaded as a counter claim or set-off in a former action against him brought by the defendant, a plea of *res adjudicata* should not be sustained, although both actions involved the same subject matter. Dixon *v.* Watson, 52 Tex. Civ. App. 412, 115 S. W. Rep. 100. "In summary proceedings instituted for the purpose of obtaining possession of leased premises because of the failure on the part of the tenant to pay rent, a failure on the part of the tenant to plead a counterclaim in such proceeding, arising on account of a breach of the contract of lease by the landlord, does not preclude the tenant from pleading such counterclaim in an action brought to recover the amount of rent due, and obtaining judgment therefor against the landlord." Gay *v.* Riehmann Mantel Co., 53 App. Div. 507, 65 N. Y. Supp. 964. "Wherever the defendant cannot obtain affirmative judgment from the plaintiff he has the right to split his set-off, and . . . his recovery in such an action only extinguishes his set-off to the amount of the plaintiff's claim." Gordon *v.* Van Cott, 38 App. Div. 564, 56 N. Y. Supp. 554.

[83] Thus, suffering judgment at suit of a physician for the value of services is a bar to a subsequent action against him for malpractice in those services. Blair *v.* Bartlett, 75 N. Y. 150, and cases cited; questioned in 2 Whart. Ev. 790, and Big. on Est. 104, 108. Compare Davis *v.* Hedges, L. R. 6 Q. B. 687; De Wolf *v.* Crandall, 34 Super. Ct. (J. & S.) 14; Davenport *v.* Hubbard, 46 Vt. 200, s. c., 14 Am. Rep. 620. When sued on a debt a defendant must plead his payments or they are barred. Kennedy *v.* Davisson, 46 W. Va. 433, 33 S. E. Rep. 291.

[84] McGuinty *v.* Herrick, 5 Wend. 240; Hatch *v.* Benton, 6 Barb. 28. Matter which is set up as a counter claim cannot subsequently be made

ord shows that a set-off was interposed, parol evidence that it was withdrawn is not competent.[85]

16. Rebuttal: Want of Jurisdiction.

Want of jurisdiction is fatal.[86]

17. — Fraud.

A plaintiff against whom a former judgment is interposed as a defense, not as a counterclaim, may without replying prove that it was a fictitious suit.[87] So he may prove fraud in the recovery;[88] but for this purpose he must prove actual fraud known and intended by the defendant, and unknown at the time to the plaintiff.[89]

the basis of an affirmative action, whether fully determined or not. Steves *v.* Fraze, 19 Ind. App. 284. When in an action for rent "the only counterclaim in behalf of the defendant which was litigated was one for damage to his goods, the judgment should in nowise conclude him from thereafter asserting any other claim which he may have arising out of the lessened rental value of the premises, or out of his expenditures for actual repairs which the landlord ought to have made." Reiner *v.* Jones, 38 App. Div. 441, 56 N. Y. Supp. 423.

[85] Davis *v.* Tallcott, 12 N. Y. 184. *Contra*, see Burnham *v.* Webster, 1 Woodb. & M. 172.

[86] Gage *v.* Hill, 43 Barb. 44. For the rules of proof, see Chap. XIX.

[87] See Gaines *v.* Relf, 12 How. (U. S.) 472, 537. "When one procures proceedings to be commenced against himself, and control both the prosecution and the defense of the case, the judgment rendered is not valid, and will not bar another action in favor of the parties whose names he used, but who in fact had no knowledge or control of the prosecution of the action." Oster *v.* Broe, 161 Ind. 113, 64 N. E. Rep. 918.

[88] Mandeville *v.* Reynolds, 68 N. Y. 528, 543, affi'g 5 Hun, 338; Verplanck *v.* Van Buren, 76 N. Y. 247, 258, rev'g 11 Hun, 328. *Contra*, Krekeler *v.* Ritter, 62 N. Y. 372, 375. If a "judgment is procured by fraud or mistake, it can not be treated as a nullity, but is conclusive upon the parties and their privies until vacated or set aside on appeal or in a direct proceeding brought for that purpose." Oster *v.* Broe, 161 Ind. 113, 64 N. E. Rep. 918.

[89] Verplanck *v.* Van Buren, (above). "The force of a judgment as being *res adjudicata* cannot be destroyed or impaired by showing that it was clearly erroneous and ought not to have been rendered, whether such error re-

18. — Appeal: Reversal.

Pendency of appeal does not necessarily impair the effect of the adjudication.[90] Reversal may be proved, though not alleged,[91] unless reply was required in the ordinary course of pleading.[92]

19. — New Title.

Plaintiff may, notwithstanding the adjudication, set up a new title acquired since then.[93]

sulted from improper rulings or misstatements of the law to the jury or for other like reasons." Anderson *v.* West Chicago St. R. Co., 200 Ill. 329, 65 N. E. Rep. 717.

[90] Paine *v.* Schenectady Ins. Co., 11 R. I. 411, and chapter XXVIII, paragraphs 28–31 of this vol. "In the state of New York, where the doctrine prevails that the taking of an appeal from a judgment does not prevent the judgment from being pleaded in bar to another action between the same parties, it is held that if, after a judgment has been successfully pleaded in the second suit, it is reversed on appeal, the judgment in the second action may be set aside by the trial court for that reason, although no error was committed on the trial." Ransom *v.* Pierre, 101 Fed. Rep. 665, 141 C. C. A. 585. (Citing Parkhurst *v.* Berdell, 110 N. Y. 386, 18 N. E. Rep. 123, 6 Am. St. Rep. 384.)

[91] Briggs *v.* Bowen, 60 N. Y. 454. "When a case which is removed to an appellate court by a writ of error on an appeal is not there tried *de novo*, but the record made below is simply re-examined, and the judgment either reversed or affirmed, such an appeal or writ of error does not vacate the judgment below, or prevent it from being pleaded and given in evidence as an estoppel upon issues which were tried and determined, unless some local statute provides that it shall not be so used pending the appeal." Ransom *v.* Pierre, 101 Fed. Rep. 665, 41 C. C. A. 585.

[92] Carpenter *v.* Goodwin, 4 Daly, 89. If a judgment-roll was competent evidence when received, its reception is not rendered erroneous by the subsequent reversal of the judgment. Notwithstanding its reversal, it continues in such action to have the same effect to which it was entitled when received in evidence. The only relief a party against whom a judgment which has been subsequently reversed has thus been received in evidence can have is to move on that fact in the court of original jurisdiction for a new trial. Parkhurst *v.* Berdell, 110 N. Y. 386, 392, 18 N. E. Rep. 123.

[93] Barrows *v.* Kindred, 4 Wall. 402; Noonan *v.* Bradley, 9 Id. 394; Merryman *v.* Bourne, Id. 599.

CHAPTER LXIII

COUNTERCLAIMS

1. Pleading. 2. Mode of proof; admission.

1. Pleading.

Facts proven do not avail as a counterclaim, unless pleaded.[94] In order to bring a counterclaim within the rule that its allegations are admitted by a failure to reply, it should be alleged in such form as to give plaintiff notice that defendant asks an affirmative judgment against him.[95] That

[94] Star Fire Ins. Co. *v.* Palmer, 41 Super. Ct. (J. & S.) 267, 271; Montanye *v.* Montgomery, 19 N. Y. Supp. 655, 47 N. Y. St. 114.

Where no counterclaim is alleged in an answer, no recovery by way of counterclaim can be had if the answer makes no demand for affirmative relief. Montanye *v.* Montgomery, 19 N. Y. Supp. 655, 47 N. Y. St. 114.

"It is held that a counterclaim or plea in reconvention is, in effect. a suit against the plaintiff, and that, where the amount of such counterclaim or plea in reconvention exceeds the jurisdiction of the court in which the suit is pending, such court is without jurisdiction to hear or determine the same." Dixon *v.* Watson, 52 Tex. Civ. App. 412, 115 S. W. Rep. 100.

Where in an action for money had and received, the defendant files a cross-complaint in which he alleges that the plaintiff had wrongfully secured the arrest of the defendant on false charges of obtaining money under false pretenses and of embezzlement, the defendant does not state a proper counterclaim. Jones *v.* Lewis, 89 Ark. 368, 117 S. W. Rep. 561.

A defendant who, in an action on certain notes given in payment of work done under a contract, fails to plead an offset for damages occasioned by a delay in completing the contract, cannot be allowed to recover for such damages when the facts establishing the offset are not set out in the answer. Title Guarantee, etc., Co. *v.* Pam, 155 N. Y. Supp. 333.

It is also held that a set-off must be pleaded. Jameson *v.* Kempton, 52 Wash. 106, 100 Pac. Rep. 186.

[95] Bates *v.* Rosekrans, 37 N. Y. 409, s. c., 4 Abb. Pr. N. S. 276, N. Y. Code Civ. Pro., § 509.

Where an answer sets up new matter constituting an affirmative defense together with new matter

which the answer only calls a defense is not admitted by failure to reply.[96] When the facts alleged in an answer might constitute a ground of counterclaim, but are such as always constituted a flat bar at law to the plaintiff's right to recover by showing, if true, that he never had any cause of action, they should be deemed to be set up as a defense merely, unless the answer expressly shows that they are set up by way of counterclaim.[97] But neither the word "counterclaim," nor any particular form is indispensable.[98] If the facts

in the nature of a counterclaim, the defendant should expressly characterize his plea as a counterclaim in order to successfully complain of the plaintiff's failure to reply. Wood *v.* Gordon, 13 N. Y. Supp. 595.

[96] Bates *v.* Rosekrans (above); Simmons *v.* Kayser, 43 Super. Ct. (J. & S.) 131, 137.

When facts are pleaded which simply go to controvert the plaintiff's claim and defeat his cause of action, but which do not show a separate or distinct cause of action balancing in whole or in part that which is to be proved by the plaintiff, a failure to reply does not admit such facts as they are defenses only. Walker *v.* American Cent. Ins. Co., 143 N. Y. 167, 38 N. E. Rep. 106.

[97] Equit. L. Ass. Soc. *v.* Cuyler, 12 Hun, 247, 251, affi'd in 75 N. Y. 511. But facts showing that the equities are with defendant will avail to defeat a recovery, though not pleaded as a counterclaim. Kingston Bank *v.* Eltinge, 66 N. Y. 625, affi'g 5 Hun, 653; Day *v.* Hammond, 57 N. Y. 479, 484. In an answer not purporting to be a counterclaim, demand for cancellation of the instrument sued on is only a defense, not a counterclaim. Eq. Life Ass. Soc. *v.* Cuyler, 75 N. Y. 511, affi'g 12 Hun, 247, 251; Barthet *v.* Elias, 2 Abb. New Cas. 364. But a claim to have further relief from another instrument is a counterclaim, and the allegations are admitted by failure to reply. Bernheimer *v.* Willis, 11 Hun, 16.

Where, in answering a complaint for compensation for services performed, the defendant alleges "for a fifth and further answer and defense" that the plaintiff is indebted to the defendant for goods sold and advances made, and prays for a dismissal of the complaint, this is held to be pleaded simply as a defense. To be considered as a counterclaim it must be distinctly so stated. Grenn *v.* Waite, 33 Hun, 191.

[98] Bates *v.* Rosekrans (above).

But see Rogers *v.* Morton, 46 Misc. 494, 95 N. Y. Supp. 49, in which the defendant set up the last paragraph of his answer in the form of a counterclaim which was demurred to as insufficient, and the court held that the defendant was bound by his own definition,

constituting a counterclaim are alleged, they may be proved; and if proved, the pleader's use of the term "recoupment," or "set-off" does not prevent the court from giving affirmative judgment.[99]

that the paragraph must be tested as a counterclaim, and that on demurrer the defendant cannot contend for its sufficiency as a defense.

Where an answer in putting in a second defense, precedes it with the words "For a second defense," not making any reference to it as a counterclaim, and prays "that these proceedings be dismissed with costs, and for such further or other relief as is within the power of the court to grant and which it may seem meet and just," any objection offered by the plaintiff that no express terms were used to define it as a counterclaim is invalid inasmuch as the facts alleged under the above designation clearly show that it was intended to set up a counterclaim. Shotland *v.* Mulligan, 60 Misc. 58, 111 N. Y. Supp. 642.

[99] Wilder *v.* Boynton, 63 Barb. 547, 549. But see Shute *v.* Hamilton, 3 Daly, 462, 475; Am. Dock, &c. Co. *v.* Staley, 40 Super. Ct. (J. & S.) 539. And to entitle defendant to rely on a failure of consideration or a recoupment of damages, it is enough that the facts are alleged, without stating which result he claims. Springer *v.* Dwyer, 50 N. Y. 19, rev'g 58 Barb. 189; Kelly *v.* Bernheimer, 3 Supm. Ct. (T. & C.) 140, s. c., 47 How. Pr. 62. Compare Dudley *v.* Scranton, 57 N. Y. 424, 427.

Where a defendant pleads "for a further and distinct defense and by way of counterclaim" and prays for $10,000 damages, and on motion at the trial has this expression stricken out and "for offset and credit as aforesaid and for such other and further relief as the court may deem just" inserted, the change in nomenclature does not make the allegation a "set-off," which can exist only when the demands of both parties are liquidated. "It remained a counterclaim, which is a separate and distinct cause of action, balancing in whole or in part that proved by the plaintiff." S. Liebmann's Sons Brewing Co. *v.* DeNicolo, 46 Misc. 268, 91 N. Y. Supp. 791.

A set-off must be due in the same right and between the same parties, and therefore a joint note of plaintiff and his wife cannot be set off against a claim solely of plaintiff's against the defendant. Cross *v.* Gall, 65 W. Va. 276, 64 S. E. Rep. 533.

"Equity will intervene to effect a set-off only when under the strict rules of the law justice cannot be effectuated." Tuttle *v.* Bisbee, 144 Iowa, 53, 120 N. W. Rep. 699.

"If a defendant has suffered damages on account of a breach by the plaintiff of the contract upon which the plaintiff bases his

2. Mode of Proof; Admission.

The mode of proof of the cause of action is the same as if stated in a complaint; and the same rules as to allegation [1] and proof [2] of damages apply. The facts alleged, if they constitute a counterclaim as distinguished from a defense,[3]

cause of action, a plea of recoupment is the procedure by which defendant may bring the matter before the court and have his damages considered." Poull *v.* Foy-Hays Constr. Co., 159 Ala. 453, 48 So. Rep. 785.

[1] Parsons *v.* Sutton, 66 N. Y. 92, 97, affi'g 39 Super. Ct. (J. & S.) 544.

When a defendant admits in his answer the allegations stated in the complaint, but sets up a counterclaim thereto, the trial judge is correct in ruling out all evidence of matters not pertinent to the issues of the counterclaim. Equitable Bank *v.* Claasen, 3 Misc. 148, 23 N. Y. Supp. 310.

A counterclaim for rent which alleges only an agreement to lease, but which does not show an agreement to pay rent or enter into possession, is demurrable on the grounds of insufficiency. Goldberg *v.* Wood, 45 Misc. 327, 90 N. Y. Supp. 427.

The rule now seems to be well established that where on an examination of the complaint and answer containing a counterclaim, it appears that the plaintiff's cause of action is referable, the defendant cannot be compelled to give up the right to have the issues set out in his counterclaim tried before a jury. Hoffman House *v.* Hoffman House Cafe, 36 App. Div. 176, 55 N. Y. Supp. 763.

[2] Isham *v.* Davidson, 52 N. Y. 237.

In an action on a contract to recover the price of three light-house lanterns which had been made and delivered to the United States Government by the plaintiff, the government pleaded, by way of counterclaim, the payment of the sum of $1,728.99 to the contractors, builders of the light-house, as damages suffered by them because of a failure on the part of the plaintiff to deliver the lanterns on time. On the trial the United States' attorney put in evidence a voucher for $1,728.99 paid to the contractors, but offered no evidence of the justice of the latter's claim or in what way they had suffered damage. It was held that the evidence offered in support of the counterclaim was insufficient. Atlanta Mach. Works *v.* U. S., 114 Fed. Rep. 364.

[3] Rogers *v.* King, 6 Barb. 495.

If an answer contains a counterclaim which is confessed as true for want of a reply, the plaintiff cannot, without the permission of the court, have an order of discontinuance. "When the motion was made for leave to discontinue this action, the defendant's answer

and are properly alleged, are admitted by a failure to reply,[4] if the benefit of this admission is claimed at the trial.[5] But it is only the facts alleged, not the conclusions of law, that are admitted.[6] Replying to a counterclaim is not a waiver of the objection that the claim is not the proper subject of counterclaim under the statute.[7]

therein, in this action, was an admitted counterclaim, entitling the defendant to the relief therein demanded. Greenia *v.* Keah, 66 Barb. 245.

[4] Isham *v.* Davidson, 52 N. Y. 237, 241.

But where the allegations in the reply set up a new cause of action by the plaintiff against the defendant, it is practically a counterclaim to a counterclaim and under the New York Code is unauthorized. An order to strike out the reply will therefore be granted. Fett *v.* Greenstein et al., 46 Misc. 574, 92 N. Y. Supp. 736.

And where allegations are made in the complaint, the proof of which would tend to overcome those matters put forth in the answer by way of counterclaim, it is error to hold that the failure to reply to the counterclaim thereby admitted its allegations. Wade *v.* Strever, 166 N. Y. 251, 59 N. E. Rep. 825.

[5] Jordan *v.* Nat. Shoe & L. Bank, 74 N. Y. 467, 471.

But see Romano *v.* Irsch, 7 Misc. 147, 57 State Rep. 493, 27 N. Y. Supp. 246, where the counterclaim asked for damages for failure to deliver a cargo of bones, and at the same time alleged that the plaintiffs were not the owners of the vessel carrying the cargo thus negativing the defendant's claim for damages. To this the plaintiff failed to reply. Upon the trial, the defendants tried the issues of their counterclaim, damages were disallowed and the plaintiffs were shown to be the owners of the vessel. Then the defendants contended that the failure to reply admitted the allegations of the counterclaim. But it was held that where the counterclaim has been tried on its merits, the plaintiffs were not thereby deprived of any defense which they might have interposed had the counterclaim been properly pleaded.

[6] Id.

Under a general denial of a counterclaim it is error to exclude evidence which goes to prove that no counterclaim existed in favor of the defendant at the beginning of the action. The John Church Co. *v.* Clarke, 28 N. Y. Supp. 870, 77 Hun, 467.

[7] Smith *v.* Hall, 67 N. Y. 48, 51.

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